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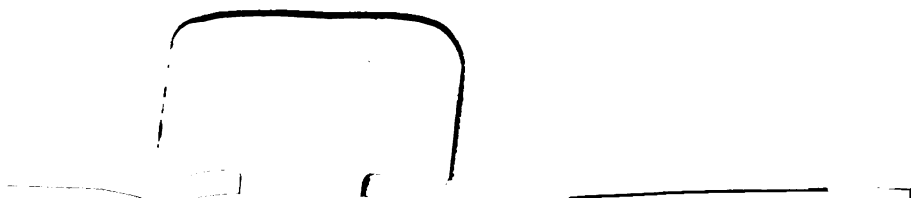
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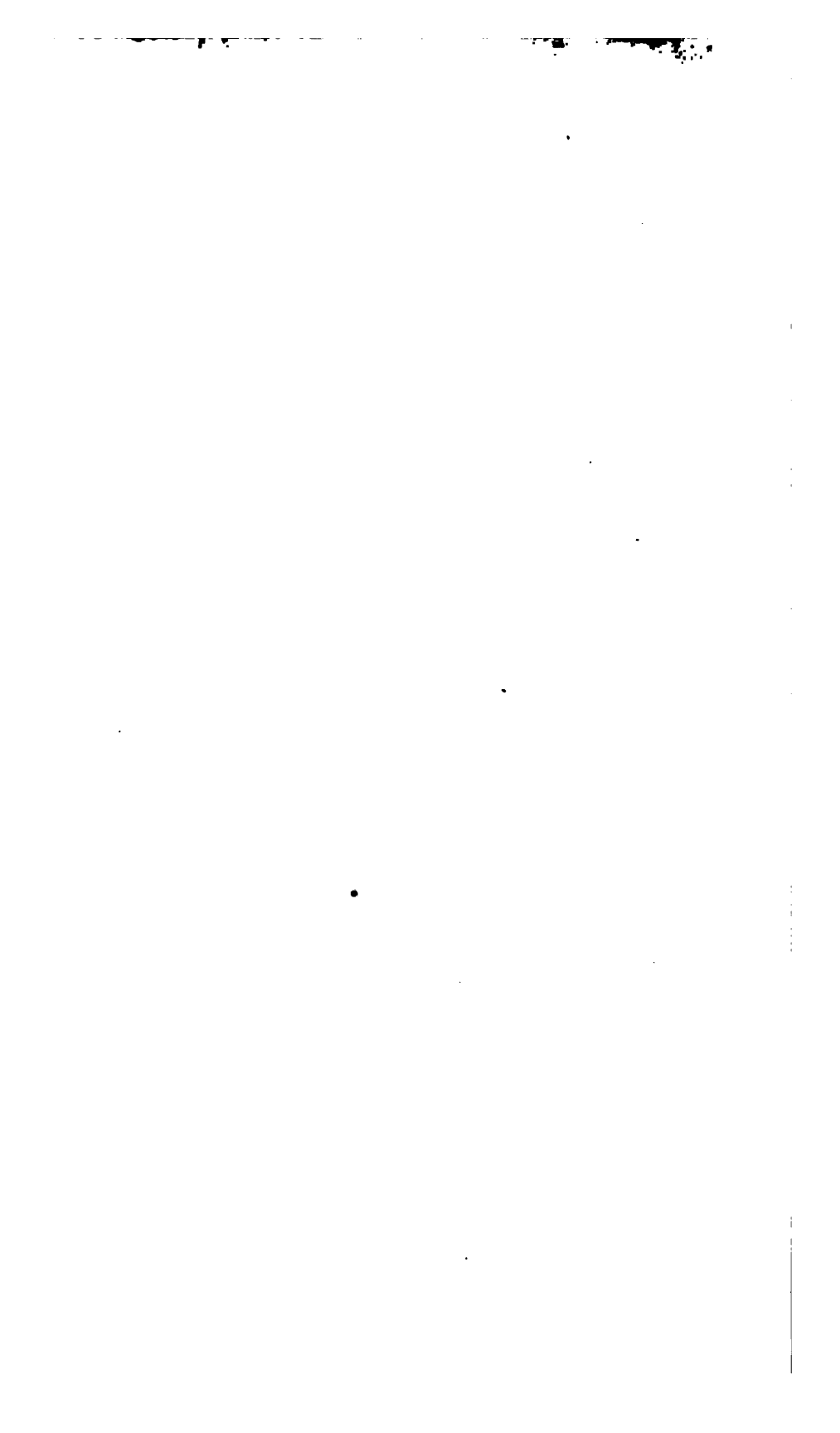
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THE
AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

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JAMES G. DAY,
JAMES H. ROTHROCK,
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* At November Term, 1878.

† At May Term, 1878.

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IN ADDITION TO THE ABOVE.

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JOHN CLEMENT,
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JOHN W. OKEY.

* For year commencing Feb. 9, 1878.

† For year commencing Feb. 9, 1879.

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VIRGINIA.

R. O. L. MONCURE, PRESIDENT.
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FRANCIS T. ANDERSON,
WALLER R. STAPLES,
EDWARD C. BURKS.

* From January 6, 1870.

† Resigned December 5, 1870.

‡ Died October 20, 1870.

§ From November 8, 1870.

| From November 8, 1870.

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CASES
IN THE
SUPREME COURT
OF
ALABAMA.

WESTERN UNION TELEGRAPH CO. v. MEYER.

(61 Ala. 153.)

Telegraph company — liability of, for message by impostor.

An impostor, at Cincinnati, sent a dispatch in the name of B. over defendant's telegraph line, to C. at Selma, Alabama, requesting C. to send a telegraphic money order to B. at Cincinnati; C. complied, and defendant paid the money to the impostor at Cincinnati; *held*, that defendant was not liable for the mistake in the absence of any suspicious circumstances.*

ACTION to recover money paid defendant for a telegraphic money order. Meyer received, through defendant's telegraph line, a dispatch from Cincinnati, signed "Max Reis," supposed to be from his nephew, who was then on his way from New York to Selma, to the effect that he had lost his ticket and money between Pittsburg and Cincinnati, and desired plaintiff to send to him at the latter place, forty dollars by telegraph immediately. This was done, the defendant giving the following receipt: "Received from Joseph Meyer forty dollars to be paid to Max Reis at Cincinnati, Ohio." The defendant on the same day handed over the money in Cincinnati to the person who sent the dispatch to plaintiff, who was not known to the company's agent, or identified as a person

*Compare *Wood v. W. U. Tel. Co.* (45 N. Y. 549), 6 Am. Rep. 140.

Western Union Telegraph Co. v. Meyer.

whose name was "Max Reis," and who proved to be an impostor, and not the plaintiff's nephew. The plaintiff had judgment below.

W. R. Nelson, for appellant.

White & White, contra.

MANNING, J. [Omitting minor points.] In regard to the merits of the case: The contract of the company was with plaintiff to pay forty dollars for him at Cincinnati, to "Max Reis," supposed by plaintiff to be his nephew. The money was not paid to the nephew, but to one whose name was unknown to the company. He was the person, though, who sent the dispatch to Meyer, and was doubtless an impostor.

The company and Meyer were both deceived. Which must bear the loss? We find no decision in such a case.

The argument for defendant is: The company was not in fault for sending at the instance of one who seemed to be among strangers, and represented himself to be unfortunate, a message for pecuniary relief to a person supposed to be his friend. It was the duty of this person to ascertain for himself that the dispatch was not spurious. When he sent for the money, the company was entitled to consider it as intended for him who sent the dispatch. To require him before receiving it, to prove his identity or name, might deprive an unfortunate person thus detained in a place where he was not known, of needed aid from distant friends; and the company would, by its refusal, subject itself to the expense and annoyance of a suit which it would probably be unable to defend.

On the other hand, it may be said: The receiver of the dispatch cannot possibly know who sent it. In the absence of notice from the company to the contrary, he might justly presume that the sender of the dispatch had been vouched for to the agents of the company, by some one they knew, who was acquainted with him. It being directed that the money should be paid to a person of the name of Max Reis, it was the company's duty not to pay it to any one else. If it lacked proof concerning his identity, having control of the telegraph, it could easily, through its manager at Selma, have obtained from plaintiff information of particulars that would enable its agents, by interrogation of the sender of the message, to ascertain whether he was an impostor or not. Questions to attain that end might easily be framed. As no inquiries on the subject

SNOW v. Carr

were made, plaintiff might well suppose that the company did not desire more information than it had. By engaging in the business of transferring money by telegraph, between persons at a distance from each other, for which it charged large commissions, it took upon itself the responsibility of doing the service correctly, and like a banker, who, by mistake, pays a draft to some one who falsely personates the payee, or a carrier for hire, who delivers goods to one not the consignee, must make good the amount so lost. And if the company is not held to the duty of taking pains to ascertain the identity of the person to whom money transferred by telegraphic orders is to be paid, nothing would be easier than to use the telegraph as an instrument for committing frauds.

My brothers think that where there is nothing to create suspicion in the minds of the company's agents, it is for the party on whom the demand is made, to ascertain for himself whether he who makes it is the person he professes to be, and that the company has no right to refuse payment of the money to him in reply to whose message the order to pay it is sent. I was strongly inclined to the other conclusion. But the case is a new one, and I defer to their opinion.

The other questions made will probably not arise again.

Let the judgment of the City Court be reversed, and the cause be remanded.

Judgment reversed and cause remanded.

SNOW v. CARR.

(61 Ala 363.)

Insurance — action by one for insurance recovered by another on his goods.

One who effected insurance covering his own goods and goods stored with him, and collected the insurance money, is liable to the owner of such stored goods for his share, although he did not request or know of the insurance, and did not ratify it before the payment of the loss.

ACTION by Carr to recover insurance on a piano which she had placed with Snow for sale or rent, and burned while in his possession. The facts appear in the opinion. The plaintiff had judgment below.

Bogles & Overall, for appellant.

Stephens Croon, contra.

MANNING, J. This case, like that of *Snow v. Stoutz*, decided at the last term, arose out of the destruction of plaintiff's piano, by the burning of the store of defendant Snow in August, 1874, the piano being then therein for sale or rent. Mr. Snow was a seller of musical instruments and other merchandise, his own, and on commission for others. The two cases presented several questions common to both ; but those upon which the judgment of *Stoutz* against Snow, in the Circuit Court, was reversed, do not arise upon this record.

On the trial of that cause, upon objection made by plaintiff, evidence offered by defendant to show that he had not received from the insurers any money on account of the piano, and that it was not intended to be and was not insured under the general words in the policy, was erroneously excluded. And it is with reference to the facts so proposed to be proved as a part of the case, namely, that the piano was not insured, and that no money was received from the insurers on account of it, that the opinion in that case is to be understood. No such testimony was ruled out or objection made to it at the trial of the cause in hand.

The policies of insurance taken by and paid to Mr. Snow upon which both suits were brought are the same. And in *Snow v. Stoutz*, two points that are presented in this case were ruled in favor of appellee, Carr, namely : First, there was no error in receiving parol evidence of the contents of those policies which had been cancelled and returned to the company in England that issued them ; and second, the policies to Snow & Brown, of whom Snow was the successor, describing the goods insured as " their own or held in trust," by these latter general words, and in the absence of evidence to the contrary, embraced the piano of plaintiff. It was, however, further held that oral testimony on the part of Snow was admissible to prove that those words were not intended to cover and therefore did not cover this piano, but related to other merchandise received from abroad, to be sold by him on commission, and which he was instructed to keep insured. See, also, *Waters v. Assurance Co.*, 5 El. & Bl. 870, and *Lee v. Adsit*, 37 N. Y. 94 *et seq.* Upon these points there was no error in the rulings of the Circuit judge in this instance.

Plaintiff testified that she had not instructed defendant to insure her piano, and said nothing about paying any premium for insurance; that she learned that her piano was destroyed by the fire of the 31st of August, 1874, and did not know or have any knowledge or information about the insurance until long after the fire. Defendant testified "that plaintiff had never asked him to insure her piano, and he had not included it in the *proofs of loss* which he rendered to the insurance companies, and had received no money therefor from said insurance companies, but *had received all the money due and payable on the policies.*" He said further that "the value of his own property destroyed in said fire exceeded the amount of all the policies over \$10,000." The insurance money was paid to him—a part in May, 1875, and the residue and larger part in August of that year; and no demand for any part of this was made by plaintiff till after that time.

1. The general charge of the Circuit judge to the jury was composed of special instructions, which obviously were not all erroneous. And the exception to that charge failing to designate any particular in which it was supposed to be wrong does not, according to repeated decisions of this court, bring up any question for our determination. The legal propositions which we are to consider all arise upon the charges asked for defendant below and refused by the presiding judge. Without repeating them here, we proceed to consider the propositions founded upon them.

According to the bill of exceptions, it contains "substantially all the evidence" that was introduced. What Mr. Snow, when testifying for himself says, is, that he "was not asked to insure the piano, and had not included it in the proofs of loss." He did not say that it was not his purpose or understanding that the policies should protect the piano, or other like goods received as this was, in his store. Nor do any of the numerous charges asked on behalf of appellant assume, even hypothetically, that the piano was not insured. And these charges if given would have required other explanatory ones on behalf of the plaintiff. No question founded upon the idea that the policies were not intended to and did not cover this instrument is presented for us to decide.

The fact that plaintiff, Carr, did not request that her piano should be insured does not prevent her from being entitled to the benefit of the insurance if effected. This was settled long ago by decisions made here and elsewhere. *Durand v. Thouron*, 1 Port.

238 ; *Batre v. Durand*, id. 251 ; *Snow v. Stoutz*, *supra* ; *Waters v. Assurance Co.*, *supra* ; *Siler v. Marrs*, 13 Penn. St. 218 ; *Home Insurance Co. v. Ball. Warehouse*, 93 U. S. 543.

The value of the goods insured and burnt being much greater than the amount of insurance, it was not necessary, in order to obtain the whole of this, to make proofs of all the goods destroyed. The omission though to do this, in such a case, cannot hurt the plaintiff. According to the policies, Snow stood in the relation of a trustee for her ; and he could not release himself from his responsibility as such, by failing to assert to others her right to a share of the money which he was demanding and receiving in full from the companies that owed it to him as trustee as well as in his own right. They must be understood as paying, and he as accepting the fund as an indemnity, according to the policies, for the loss of the goods insured, those of others as well as his own. *Batre v. Durand*, 1 Port. 255-6.

Was it, as supposed, necessary to entitle plaintiff to the benefit of these policies, that she should, before they were paid, have ratified the acts by which they were procured, or in any other manner have expressly signified her adoption of the policies ? In *Batre v. Durand*, *supra*, this was done after the fire, though before payment of the loss ; and the court held that sufficient. Whether any such ratification was essential or not, was a question not then presented. The answer to it must depend on the nature and facts of the case. It is easy to imagine circumstances which would make a ratification requisite. But persons engaged in a business by which large quantities of the goods of others pass into their possession and charge, and out again to others, soon afterward, may find it to their advantage to take out policies of insurance at their own expense for the protection of such goods. Said Lord CAMPBELL : " It would be most inconvenient in business, if a wharfinger could not, at his own cost, keep up a floating policy for the benefit of all who might become his customers." 5 El. & Bl., *supra*, p. 881. The expense might be " much more than repaid by augmented business induced by the confidence which an insurance would inspire." *Liter v. Marrs*, 13 Penn. St. 220. For aught that appears, it was with such views and in consideration of their custom, that Mr. Snow took out policies which protected the goods of those from whom he received them for sale on commission. And this being beneficial to plaintiff, and not imposing upon her any burden, her assent to it,

like that of a creditor to an unconditional assignment for his benefit from his debtor, is to be presumed.

It is contended that defendant is entitled to have the loss of his *own property* by the fire of August, 1874, first made good out of the insurance money; and that plaintiff's right is limited to the residue only, if there be any. The contrary of this was decided by the Supreme Court of Pennsylvania in *Liter v. Marrs*, 13 Penn. St. 220. In regard to a similar policy, it was there held that it afforded to the *property* of the assured and that of his customers "equal protection." "Its terms (says the opinion) place all the goods in the warehouse from time to time on the same level; all are equally protected. A similar decision had been made in this State more than twenty-five years before in *Datre v. Durand*, *supra*. It was then held, of a policy like those taken by Mr. Snow: "That the sum at which the policy was valued may have been less than the value of all the articles consumed, does not destroy the right of any for whose benefit the insurance was effected, to his proportion of the proceeds."

In the Pennsylvania case cited, reference was made to a passage found in Story on Agency, § 111 (as now numbered), which seemed adverse to the views of the court. Speaking of agents, that learned jurist said: "If they insure in their own name only, they may in case of loss recover the whole amount of the value of the property insured from the underwriters, and the surplus beyond *their own interest* will be a resulting trust for the benefit of their principals." Of the authorities given for this passage, it is remarked in the opinion, that they "do not so much as allude in the slightest manner to what is supposed" to be its meaning; and no other authority for it was then known. It was, therefore, inferred that it was not correctly understood. Six years afterward in *Waters v. Assurance Co.*, a suit of the assured against the insurer on a similar policy, Lord CAMPBELL, C. J., remarked of the assured: "They will be entitled to apply so much to cover their own *interest* and will be trustee for the owners as to the rest." 5 El. & Bl. 881. And in a like case of the assured against the insurer (*Home Ins. Co. v. Balt. Warehouse Co.*, 93 U. S. 543), Mr. Justice STRONG recently said: "It is undoubtedly the law that wharfingers, warehousemen and commission merchants, having goods in their possession, may insure them in their own names, and in case of loss, may recover the full amount of insurance for the sat-

 TYSON v. North and South Alabama Railroad Co.

isfaction of their own *claims* first, and hold the residue for the owners."

But these learned lawyers did not mean thus to decide, in cases between parties in which the question could not arise, that when agents or bailees insured goods of their own and goods belonging to their customers, by policies like those in question, and received the entire amount stipulated to be paid in case of loss, they were entitled to payment in full for the loss of *their property* first, and that the others were to be paid only out of the residue. They do not speak of the property of the assured, but of their "interest" in or "claims" against the *property* of their principals, for storage, insurance, advances, commissions and other charges, to secure which they had a lien on the property, and were entitled to an extension of it to the insurance-money which they should receive in place of the property. This appears upon an examination of the passages themselves, and is made more apparent by a consideration of the cases and of the authorities referred to in the opinions.

The rule for distributing among several the proceeds of a security provided for them all in common, but insufficient for the payment of all in full, is that *equality is equity*; and if one of them have a lien, by law or contract, thereon for payment of the debt of another to him, the lien shall be discharged out of the debtor's share of the fund.

This disposes of, adversely to appellant, all the questions raised by his exceptions and assignments of error.

The judgment of the Circuit Court must be affirmed.

Judgment affirmed.

 TYSON v. NORTH AND SOUTH ALABAMA RAILROAD CO.

(61 Ala. 554.)

Negligence — liability of corporation for that of general manager in selecting servants.

A corporation which has delegated to one of its agents the power and duty of appointing and removing employees, is liable to one of its employees for injury to him by the negligence of a third so appointed, when the agent has not exercised due care in the selection, although the agent himself is of competent skill and intelligence.

Tyson v. North and South Alabama Railroad Co.

ACTION for personal injuries sustained by Tyson, while in the service of the defendant, through the negligence of Lovelace, a co-servant. The opinion states the point.

Arrington & Graham, and C. W. Ferguson, for appellant.

Rice, Jones & Wiley, contra.

STOKE, J. In the case of *The Mobile and Montgomery Railroad Co. v. Smith*, 59 Ala. 245, we decided that Jordan, the superintendent of the road, and O'Brien, the supervisor of that part of the road, on which the injury complained of was done, were fellow-servants of Smith, the brakeman, who was plaintiff in that suit. In that case we said : "It is proved that Jordan, the superintendent, O'Brien, the road supervisor, Price, a section master to whom blame is ascribed, and Mitchell, the engineer of the train, were all of them competent, prudent, and experienced in the several duties to which they were respectively appointed. These were all the persons in any way chargeable with the mishap, who were concerned in the service." The fault which led to the injury complained of was chargeable to one or more of the above-named employees or servants of the railroad corporation. But the fault was committed in that case by one or more of the servants aforesaid, while they and Smith were acting in the common business of the same master, the railroad corporation. We held that the railroad was not responsible in that case for injury done the plaintiff, by the negligent performance of duty by a fellow-servant. That case was distinguished from *Walker v. Bolling*, 22 Ala. 294; and the principle announced in the older case was not intended to be impaired. In the latter case we said : "In *Walker v. Bolling* this court held that where there is a general manager or superintendent, who is invested by the common employer with the duty and authority of employing and dismissing the inferior agents and servants who are under him, the master is responsible for acts of negligence on the part of the superintendent in failing to exercise due care and diligence in the employment of competent agents, or in not dismissing those who are proved to be incompetent." The distinction may appear to be a narrow one, but we think it is founded in solid reason. In the one case the servant simply performs the labor assigned him. He has no authority or power to sublet, or delegate the service to

another. If his principal, the railroad corporation, has selected him with care; if he possess the requisite skill, qualifications and good character, then the corporation, which speaks and acts through its officials, has done its duty, and will not be held to account to another servant or employee for any injury that may have resulted from the fault or negligence of such accredited first-mentioned employee. Such is the weight of authority, and such are our decisions. We have no desire to overturn them. *M. & O. R. R. Co. v. Thomas*, 42 Ala. 672. In the case cited, our predecessors used the following language: "There are perils incident to the servant's employment, against which caution and prudence cannot perfectly guard. Those perils and risks the servant must be presumed to know as well as the master, and when he contracts, he must be understood to assume them, and stipulate for a compensation apportioned thereto. It is in this that the relation of a railroad corporation to passengers differs from its relation to servants. The principle has been so often declared, both in England and in this country, that it has ceased to be disputable." See, also, the authorities collected and collated in the able opinion in that case.

But the question we have been discussing is not the question in this case. The bill of exceptions states "that on the night when the injury occurred the regular night engineer was excused for sickness, and the regular day engineer complained of being tired, and thereupon the yard master of the defendant, who was invested with authority to remove and appoint engineers at will, and who was proved to be a competent and skillful man for his position, put one Lovelace in charge of the engine, without the consent or knowledge of the plaintiff; and while said Lovelace was, without plaintiff's knowledge, acting as engineer, and by reason of the ignorance or negligence before stated, plaintiff was hurt." There was testimony tending to show that Lovelace was not a competent engineer. It appears then that part of the administrative functions of the corporation were confided to sub-agents and employees. Such practice may be, and probably is, necessary in the control and government of so large a corporation as a railroad usually is. But the performance of such delegated power by the sub-agent or employees is the act of the corporation, and the corporation is responsible for its faithful and prudent performance, to the same extent as if the service were performed by the highest officer of the corporation. The selection and removal at will of engineers in

Tyson v. North and South Alabama Railroad Co.

control of locomotives is a high and responsible function, and the consequences of errors or misplaced confidence therein are too fearful to be lightly passed over. The railroad corporation must not only have a competent and skillful man for this position, but he must prove his competence and skill by selecting competent and skillful persons to execute his orders. Failing to do so, the railroad corporation he represents is accountable for the injury resulting from such failure. This, we understand, is the result of the principle declared in *Walker v. Bolling, supra*, which was reaffirmed in *Cook v. Parham*, 24 Ala. 21. Speaking on this question, Chief Justice WALKER, in *M. & O. R. R. Co. v. Thomas*, said: "The master is answerable that the servants shall be persons of ordinary skill and care. This qualification has been twice announced in this State. The precise shape of its statement is, that it is the master's duty to use due care in procuring competent servants or officers, and he is responsible for a failure to discharge that duty. With this qualification the rule above stated, which prevails in England, must be regarded as established in this State." The rule referred to is, that the master is not responsible to one servant for injury caused by the fault or negligence of another. And so we hold that while the railroad company is not responsible to Tyson for injuries which he sustained by the fault or neglect of Lovelace, provided the latter was a competent and skillful engineer, yet, if he was not competent and skillful, then the corporation is responsible to Tyson for any injury that resulted from such want of competence and skill.

The rulings of the Circuit Court were not in harmony with the views above expressed.

Reversed and remanded.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

WHITE V. THE PEOPLE.

(80 Ill. 117.)

Criminal law — limiting arguments of counsel.

On the trial of an indictment for larceny where six witnesses were examined on behalf of the people and three on behalf of the defendant, it was held error for the court to limit the arguments of counsel to five minutes each.*

CONVICTION of larceny. On the trial four witnesses were examined in chief by the prosecution, three on behalf of defendants, and the prosecution then introduced two witnesses in rebuttal. The court ordered that the attorneys for the people and for defendants be each limited in the time of their respective arguments to the jury to five minutes. The attorney for defendants stated that the time was insufficient, and unless further time was allowed him he must decline addressing the jury at all; but the court refused to change said order, and counsel excepted and declined making any address to the jury.

John Lyle King, for plaintiffs in error.

S. L. Mills, State's attorney, for the People.

*See note, 27 Am. Rep. 412; *Dille v. State*, post.

White v. The People.

BAKER, J. This record presents a grave and important question, that is now for the first time submitted to this court for decision. The first clause of the ninth section of article 2 of the Constitution of the State provides that in all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel. The right of trial by jury is guaranteed by the fifth section of the same article of the Constitution; and section 431 of the Criminal Code makes the juries in all criminal cases judges of both the law and the fact. In *Meredeth v. The People*, 84 Ill. 480, this court said: "The argument of a cause is as much a part of the trial as the hearing of evidence. It is a right in his defense secured by the law of the land, of which a citizen cannot be deprived."

In *Ward's* case, 3 Leigh, 744, a criminal case, where the evidence was all on the side of the Commonwealth, and was unimpeached, and the trial court was of the opinion the testimony was clear and distinct as to the fact charged, and that it could not be varied by argument of counsel, it was held by the General Court of Virginia it was not in the discretion of the court to prevent the counsel of the accused from arguing the question of fact before the jury, and that it was the right of every party accused with crime to be heard by counsel on his whole case.

The plaintiffs in error had an undoubted right, under the very Bill of Rights itself, and by the law of the land, to defend by counsel, and to insist such counsel should have reasonable opportunity to discuss before the jury both the facts and the law of the case. This was a constitutional and substantial right of which no court could properly deprive them. It was not a mere empty and nominal right to have an argument made in their behalf that would necessarily be but a brief and idle form — to have a discussion of the law and the evidence that was confined within a space of time so short as to be wholly inadequate to afford any opportunity to examine or discuss either the law or the evidence involved. Surely such was not the right deemed by the people of sufficient importance to be incorporated into the fundamental law of the land.

The indictment was for a felony. The value of the property alleged to be stolen was found by the jury to be \$125, and on the trial quite a number of witnesses were examined. The evidence was to some extent conflicting, and much of it was of a circumstantial character, and several issues, both of law and of fact, were involved in the case. These questions, of either kind, were to be

determined by the jury. We can readily see it was utterly impossible for counsel to intelligently discuss either branch of the case in the brief space of five minutes.

The right of argument is only valuable as it will afford an occasion to impress and influence the tribunal to which it is made.

This can only be done by a process of reasoning — by a presentation of points and considerations addressed to the understanding and experience. The limitation of five minutes was a virtual denial of the right of the accused to be heard by counsel. The fraction of time to which counsel was restricted was unreasonably short, and wholly insufficient to enable him, be he ever so terse, to discuss the case with a reasonable hope of any probable, if even possible, effect upon the determination of the issues.

In *The People v. Keenan*, 13 Cal. 581, the defendant was tried upon an indictment for murder, and the trial court limited his counsel to a speech of an hour and a half, and to this action of the court an exception was taken; at the expiration of the hour and a half the prisoner's counsel applied for an extension of the time so as to enable him to finish his argument to the jury, but his application was refused, and he again excepted. The case was one depending on circumstantial testimony. The Supreme Court reversed the judgment of conviction on account of such limitation of the time allowed for argument, and they said: "It is impossible to deny that if the constitutional privilege of being heard by counsel be allowed at all, it must be so admitted as that the prisoner may have the benefit of a complete discussion of all the matters of law and evidence embraced by the case."

In the case at bar we hold that it was error in the court below to limit the counsel of plaintiffs in error to an argument of five minutes. Such restriction was, under the circumstances of the case, unreasonable, and substantially a denial of a constitutional right. At the same time we fully recognize the fact that a *nisi prius* court must necessarily have and exercise a large discretionary power in matters of this sort; it can limit the arguments of counsel within reasonable bounds, otherwise the business of the court might be seriously impeded, and to great public detriment. But the restriction must always be a reasonable restriction, and what is reasonable must be determined from the character and circumstances of the case on trial. The limitation should not, in any criminal prosecution, be such as would deprive the prisoner of the right

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given him by the law to make his defense before the jury and to be heard by his counsel on his whole case.

For the error indicated the judgment of the Criminal Court is reversed, and the cause remanded for a new trial.

Judgment reversed.

REYNOLDS V. ADAMS.

(90 Ill. 134.)

Evidence — of want of mental capacity and undue influence — family transactions — declarations of testator.

On a trial of the validity of a will, opposed on the ground of want of mental capacity and undue influence by a second wife, it is error to exclude evidence of occurrences in the testator's family within a year before the execution of the will, showing the private history of the family and the testator's relations with his wife, and the means employed by her to wean his affections from the step-children and obtain benefits for herself.

The declarations of a testator at or about the time of the execution of the will are admissible in a contest of the will to show his mental condition. (*See note, p. 22.*)

A PPEAL from probate of a will. The opinion shows the facts.

Williams, McKenzie & Calkins, for appellant.

L. Douglass, for appellee.

SCOTT, J. There was exhibited in the county court of Knox county an instrument in writing with a codicil attached, purporting to be the last will and testament of James A. Bundy, deceased. From the order admitting the same to probate, the heirs of the testator prosecuted an appeal to the Circuit Court of that county, under that clause of the fourth section of the act in relation to "Wills," which provides that appeals may be taken from the order of a county court allowing or disallowing any will to probate, to the Circuit Court of the same county, by any person interested in such will, and the trial of such appeal shall be *de novo*.

On the trial of the appeal in the Circuit Court proponent proved by the subscribing witnesses the execution of the will and codicil,

that they were witnessed with the usual formalities, and the testator, at the time of the execution of both instruments, was of sound mind and memory, and rested her case. The defense sought to be made by contestants was two-fold: First, the want of capacity in the testator to make a will, and second, undue influence exercised by proponent over the testator to induce him to make both the will and the codicil. The case seems to have been submitted to a jury without argument or instructions from the court, who found the "will in controversy was the will of James A. Bundy," but there was no finding as to the codicil. Upon receiving the verdict the court ordered and adjudged that "said will is duly proven as the will of James A. Bundy, deceased, together with the codicil thereto annexed, and that the same be admitted to probate and record," and rendered judgment against contestants for costs.

A short history of the case may assist to a clearer understanding of the legal propositions discussed. The testator was twice married. By his first wife he had a number of children, with whom he always maintained the most affectionate relations until after his second marriage. In 1870 the testator, then a widower of the age of sixty-eight years, being in feeble health, undertook a journey to California. On account of the condition of his health his daughter, Mrs. Gordon, accompanied him to secure for him that care which his physical condition required. His daughter remained with him about a month and then returned to her home. On his way out the testator made the acquaintance of a lady on the train, of whom he had never heard before, and whom he married within a month after his arrival in California. After their marriage the testator and his wife returned to his former residence in this State, where they resided until his death, which occurred July 25, 1875. The health of the testator never materially improved after his second marriage. Much of the time he was confined to his room, was constantly under the care of a physician, and steadily grew worse until his death. He had no children by his last wife.

On the 17th day of April, 1874, he made and published his will, by which he bequeathed to the Methodist Episcopal church \$1,000, to be applied to the support of a mission in China; also \$500 to the Methodist Episcopal church in Galesburg; also to Carrie Gordon, an adopted daughter of his son-in-law, the sum of \$1,000; also to his grandson James Grant Bundy, \$1,000; also to each child of his daughter Martha, \$5; also to his grandson Albert West, \$5; also

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to his daughter Angeline Gordon, \$5; also to his son Milton Bundy, \$5; and all the residue of his estate, real and personal, he devised and bequeathed to his wife, Mary A. Bundy, since intermarried with Mr. Adams, and it is in the latter name she now defends. The proponent was herself named as sole executrix of the will, and relieved of the statutory duty of giving bond as such executrix. This will was witnessed by Leander Douglass and William W. Porter.

On the 3d day of April, 1875, the testator made and published a codicil to his will, by which he revoked the following bequests therein made: First, the bequests to the Methodist Episcopal church; second, the bequest to Carrie Gordon, and third, the bequest to James Grant Bundy, and republished the will as changed. The codicil was witnessed by Leander Douglass and John W. Boyd, with the usual formalities.

By the provisions of his will all the children of the testator were cut off from any participation in his estate with five dollars each, while the major portion of his property, which was quite considerable, was given to his wife, whom he had recently married, in his old age, after a brief acquaintance. It will be noticed the bequests in the will, above mere nominal sums, were all revoked by the codicil, so that proponent became the sole legatee of the entire estate to the absolute exclusion of all his children and grand-children. Prior to the second marriage of the testator he had always lived on the best of terms with his children, but after that event, both before and after the making of his will, he entertained the bitterest hatred to most if not all of them. It does not appear that the testator ever recovered his health after his journey to California. His head was much affected. One of the physicians who attended the testator describes his mental and physical condition a short time before the making of the will. He saw him in July, 1873, and says "he was then in very poor health, very feeble,—he was not himself; his condition was such as to render him more susceptible of being influenced by those around him; he was constantly racked with pain; he was dependent as a child."

On being recalled, he says the testator "was then under the control and influence of his wife as much as an infant two hours old ever was under the control of a nurse and mother,—as helpless and dependent upon her for every thing—a drink of water or any little attention that he needed; he was perfectly under her con-

trol; he could not help himself." It is certain the testator did not have that vigor of will which he possessed prior to his sickness, but whether his wife obtained that control over him attributed to her, and whether she exercised it for improper purposes, are of course questions of fact to be found from the testimony.

On both grounds on which the will was contested there was evidence offered. As to the mental capacity of the testator, the testimony of both professional and non-professional witnesses was taken, but as another hearing of the cause is to be had on account of the rulings of the court in rejecting proper testimony, a majority of the court are of opinion it is not proper at this time to remark upon what it may be thought to prove or tend to prove. On the question made, as to the undue influence it is alleged the party proponent exercised over the testator to induce the making of the will and codicil, and for which purpose alone it seems to have been offered, the evidence consists largely of the acts of the parties and the declarations of the testator made both before and after making the will. Much of the latter class of testimony was excluded from the consideration of the jury after it was given.

On motion of proponent the court ruled out from the consideration of the jury all the testimony of the witnesses Hockett, in relation to matters occurring in the family of the testator between July and October, 1873. The testimony excluded, in some respects was all important, as it afforded an insight, not otherwise obtained, into the private history of the family, and furnished a clearer understanding of the relations of proponent and the testator at any time near the date of the will, than any other evidence in the record. It tends to show what means contestants insist were employed by proponent to alienate the affections of her husband from his children by a former wife, and to obtain the control of his property. According to the testimony of one of the witnesses, if it can be believed, she compelled him to forbid his children visiting his house, and at one time when his son-in-law and his daughter called, she became very angry, and carried on so because he would allow them to visit him, that he told her if she would say no more about it for a certain length of time — two weeks — he would give her \$1,000, but the witness adds "she did not stop."

The testimony excluded further tends to show she constantly importuned him to deed his property to her, and he would try to quiet her by assuring her he would make provision for her in his will,

which the sequel shows he did. One reason, it is said, she constantly urged why the property should be deeded to her was, that she might hold it "in the case the will was broken." Many other facts of the same nature, tending to show the relations that existed between the parties, were disclosed, but those stated are sufficient to show the character and importance of the testimony excluded, if it was true, and for the purposes of this decision it must be regarded as true and as proving all it tends to prove.

The reason assigned by the court for excluding this testimony is, that "it was too remote the time of the execution of the will." But the decision can hardly be supported for that reason, as the contestants offered to prove declarations of the testator near the time, both before and after the execution of the will, to show that the same state of affairs must have still continued to exist, but were denied the privilege. The argument now advanced in support of the decision of the court is, that the declarations of the testator, neither before nor after the execution of the will, are admissible in evidence to defeat the will. As authority for the position assumed the case of *Dickie v. Carter*, 42 Ill. 376, is cited. That case simply expresses the well-understood doctrine that a testator cannot revoke or otherwise invalidate his will by parol declarations made previously or subsequently to its execution. That principle is nowhere questioned. A will once executed with the usual formalities prescribed by the statute, and valid, can only be set aside by a revocation, in writing, of the same grade, witnessed with the same formalities, or by destruction, as by burning or tearing it up, when deliberately done. The rule deducible from the cases on this subject is, that while the declarations of a testator are not admissible to show an express revocation of his will, or the fact it was executed under duress or from undue influence, they may nevertheless be proved and used to show his mental condition at the time of the execution of the will, or so near the time the same state of affairs must have existed. That is the principle on which the jury ought to have been permitted to consider the testimony excluded by the decision of the court. It tended to show his mental condition, the annoyances he was subjected to by the continual importunities of his wife, his susceptibility to the influence of those in whose care he was, and his helplessness in their hands, from want of mental vigor induced by long sickness, to resist any influences that might be brought to bear on him. On reference it will be seen this is the

doctrine of the cases cited in *Dickie v. Carter*, in support of the views expressed, so far as they discuss this subject.

In the latter case of *Waterman v. Whitney*, 1 Kern. 157, the court remark upon the case *Jackson v. Kniffen*, 2 Johns. 31, one of the cases cited in *Dickie v. Carter*, and treat it as not inconsistent with the principle that declarations of a testator, made either before or after the execution of the will, are admissible in evidence to show the mental capacity of the testator, and this case was decided long before the decision in *Dickie v. Carter* was announced. In citing *Jackson v. Kniffer*, in *Dickie v. Carter*, it must be presumed this court understood the case as it was understood by the court that pronounced it.

In *Waterman v. Whitney*, Mr. Justice SELDEN very justly remarked, that "much of the difficulty, however, had arisen from the omission to distinguish with sufficient clearness between the different objects for which the declarations of the testator may be offered in evidence in cases involving the validity of their wills." He then proceeds to discuss the rules by which the admissibility of evidence in such cases is governed, as they naturally arrange themselves in the following classification: 1st, to show a revocation of a will admitted to have been once valid. 2d, to impeach the validity of a will for duress, or on account of some fraud or imposition practiced upon the testator, or from some other cause not involving his mental condition, and 3d, to show the mental capacity of the testator, or that the will was procured by undue influence.

After a careful review of the authorities, the conclusion was reached, that the numerous cases in which the declarations of testators have been held inadmissible upon contests respecting the validity of their wills, apply to one or the other of the first two of the three classes into which the subject was divided, and that none of them have any application to cases in which the will is assailed on account of the insanity or mental capacity of the testator at the time the will was executed, or on the ground the will was procured by undue influence. Such prior and subsequent declarations of testators in such cases are held to be competent evidence only as to the mental capacity of the testator.

Another case cited in *Dickie v. Carter* is *Comstock v. Hadlyne*, 8 Conn. 254, erroneously cited as being in 8 Cowen, 263, where it was declared the declarations of a testator, in a contest involving the validity of his will, are admissible to show the testator's state of

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mind, but not to prove the facts stated. The distinction between the proofs of alleged facts and of the mental condition of the testator whose will is assailed on account of mental infirmities, is not discussed in *Stevens v. Vancleve*, 4 Wash. C. C. 262, another case cited in *Dickie v. Carter*.

In *Shailer v. Bumstead*, 99 Mass. 112, it was said by the court, in discussing the subject: "As before stated, the previous conduct and declarations are admissible, and so, by the weight of authority and upon principle, are subsequent declarations when they denote the mental fact to be proved."

In *McTiggart v. Thompson*, 14 Penn. St. 149, it was distinctly ruled that declarations of a testator, though made after the execution of the will, are admissible in such cases as evidence of imbecility of mind. Many other cases to the same effect might be cited, but it is believed these are sufficient to show that the principle we are endeavoring to maintain has the support of well-considered cases in other courts of the highest authority.

But aside from all authority, on the principle, declarations of a testator, in a contest involving the validity of his will, as respects his mental condition at the time of its execution, are and ought to be admissible. Often such declarations may be most satisfactory evidence, and afford a clearer understanding of the testamentary capacity of the testator than any other evidence that could be produced. Naturally, the mind sympathizes with the body in that which debilitates, and such testimony may show a mind weary beyond further endurance by long continued ill-health and incessant and vexatious importunities, and willing to purchase rest and quiet at any price. More than that, it may be proof of that condition of mind readily susceptible of impressions from any source. Nothing is more certain than that the enfeebled and weary mind is, in that condition, most susceptible to any influence calculated to annoy and harass. It is a proposition that needs no argument in its support, that the feebler the mind, no matter from what cause—from sickness or otherwise—the less evidence will be required to invalidate the will of such a person on the ground of undue influence.

Whether the testimony excluded was true or untrue we express no opinion. It was error to exclude it, and for that reason the order admitting the will and codicil to probate will be reversed, and the cause remanded.

Judgment reversed.

Patterson v. Lawrence.

NOTE BY THE REPORTER.—To the same effect, see *Bates v. Bates*, 37 Iowa, 110; 8 C., 1 Am. Rep. 260.

In *Todd v. Fenton*, 66 Ind. 25, it is said: "The appellants asked, and the court gave the following charge: 'No. 35. If you find from the evidence that Elizabeth Todd, the deceased, from five to ten days before the will was made, made statements to John Pattie in respect to Joseph Todd having teased her to make a will, and that she made statements, a week after the will was executed, to the witness, Mrs. Temperly, to the effect that she was very sorry that she had made a will, and that Joseph and Newton Todd had asked or solicited her to make a will, you have a right to consider these statements in deciding upon the soundness of Mrs. Todd's mind at the time she signed the will; but you cannot consider these statements upon the other issues in the case; they have no tendency whatever to prove fraud, duress or undue influence, or that Joseph or any of said children made such statements.' But the court added to the charge the following words: 'Unless they were made at the time, and became a part of the *res gestæ*.'"

"The proposition embodied in the charge as asked is settled law. While the statements made by a testator before, or after, or contemporaneously with, the execution of a will may be competent as tending to show his mental condition at the time of its execution, statements made by him not contemporaneously with its execution are not competent to prove fraud, undue influence, etc. *Hayes v. West*, 37 Ind. 21.

"The charge as asked should have been given, and the court clearly erred in adding the appended words. The words added could but lead to confusion and uncertainty, and were of such character as to be likely to mislead the jury.

"The time referred to in the words added by the court must have been the time of the execution of the will. The charge as asked had no reference to statements of the testatrix, made at the time of its execution. It specifically and pointedly referred to a time from five to ten days prior to its execution, and to a time a week after its execution.

"The effect of the words added was to say to the jury, that, if the statements thus referred to as made so long before and so long after the will was executed, were made at the time of its execution, and became therefore a part of the *res gestæ*, they might be considered upon the questions of fraud, undue influence, etc.

The jury might well have inferred from what was added by the court, that, in its opinion, as matter of law, the times specified in the charge might be regarded as the time of the execution of the will, and therefore, what was said at those times by the testatrix might be a part of the *res gestæ*."

PATTERSON V. LAWRENCE.

(90 Ill. 174.)

Marriage — estoppel of married woman.

A married woman held in her maiden name real estate which belonged to her before marriage. Representing herself as a widow and conceding her marriage, she applied for a loan thereon, and executed a mortgage therefor in her maiden name, without her husband joining in it, the other party being ignorant of her marriage. *Held*, that in equity she could not avoid the mortgage and retain the money.*

BILL to enforce trust deeds. The opinion states the facts. The complainant had judgment below.

* See, to same effect, *Shivers v. Simmons* (54 Miss. 530), 28 Am. Rep. 372, and note, 374

Patterson v. Lawrence.

F. S. Murphy, for plaintiff in error.

Williams, McKenzie & Calkins, for defendant in error.

WALKER, J. In the month of August, 1867, Melvina Brazee was married to one Robert Patterson. On the second day of the following September she obtained a conveyance of lot 9 in block 45, of the original plat of the city of Galesburg. The conveyance was to her by the name of Melvina Brazee, which was her name by a former husband, from whom she was divorced. On the same day she executed, by the same name, a deed of trust to O. F. Price, for the use of N. Brisco, on this lot, to secure the payment of \$600, which sum she paid for the lot. On the 8th of September, 1868, she went to one McChesney, an insurance and loan agent, to procure a loan of money, introducing herself as Mrs. Brazee, saying her property was advertised for sale under the trust deed, and she would lose it unless she could procure \$600. McChesney stated the facts to R. A. Lawrence. Lawrence offered to loan the money to her if she would secure its payment. The title was examined, and found to be in her name as Brazee, and being asked by McChesney if she was a widow, she answered she was. Being satisfied with the title and security, Lawrence loaned the money, and took two notes of \$300 each, drawing ten per cent interest, executed by her in the name of Melvina Brazee, and also a trust deed on the lot, in the same name. Failing to pay the interest at the expiration of a year, she requested the loan of \$40, which Lawrence let her have, and took a note for \$100 to cover the interest and this loan, securing the same by a second trust deed, executed in the same manner. Failing to make payment at the end of the second year, the property was advertised and sold under these trust deeds, and purchased by Lawrence for the amount of the debt, interest and costs, and he received a conveyance from the trustee.

It also appears that Mrs. Patterson took a lease in the name of Brazee, and an agreement, that on the payment of \$900 by the 1st of February, 1871, Lawrence would convey the premises to her. On the termination of the lease she refused to surrender possession. Thereupon Lawrence commenced an action of forcible detainer, to recover possession, and at the trial she produced the certificate of her marriage to Patterson, which seems to have been the first information which came to Lawrence's knowledge that she was a married woman, or her name was not Brazee. That suit was dismissed

and a bill in chancery was filed, setting up the facts, charging fraud in procuring the money and in the execution of the trust deeds, and alleging that there was due \$798 — that the property belonged to Mrs. Patterson, and her husband had no interest therein. The bill charges that by reason of the fraudulent concealment of her marriage, and the husband not joining in executing the trust deeds, the fee to the lot did not pass by the sale to complainant, and prays that the title be decreed to be in complainant, and for other and further relief.

An answer was filed, admitting that she executed the trust deeds in the name of Brazee because the title was so conveyed to her, and she supposed it was necessary, to convey title; sets up her coverture, and denies all fraud on her part, and the indebtedness is that of the husband, and not of the wife; denies all right to relief. A replication was filed.

On a hearing, the court below, on bill, answer, replication and proofs, found for complainant, found the amount due, and ordered that in default of its payment in thirty days the master sell the lot on the usual notice, subject to redemption. Defendant Melvina Patterson brings the record to this court on error, and asks a reversal.

It is urged in affirmance, and as the court below found, that this loan was obtained by fraud. On the other side it is claimed, and set up in the answer, that plaintiff in error intended at the time to execute the trust deeds in such a manner as to be valid and binding — that no fraud was intended and none was perpetrated. McChesney swears positively that he asked her the question whether she was a widow, and she said she was; and that this was before the loan was made; and defendant in error testified that she always represented herself to him as a single woman. On the contrary, plaintiff in error denies that she ever made such statements to either of them. It is insisted that she is corroborated by Dr. McDowell, with whom she consulted at McChesney's office, on the day she says she obtained the money, in reference to the sickness of her husband; but they state McChesney or defendant in error was not present.

This evidence, we think, strongly preponderates in favor of defendant in error. He and McChesney seem to testify fairly. On the other hand, plaintiff in error seems to have, from the beginning, acted in bad faith. She introduced herself to McChesney, and

defendant in error says to his family, as Mrs. Brazee. We apprehend no one is so ignorant as not to know, in this country, that the name of the wife is, by the marriage, changed to that of the husband. She then must have known, when she passed herself by the name of her former husband, that she was stating what was not true — that if believed, she was deceiving defendant in error — and that he was relying on such statement. She could not have been so ignorant as not to have known that she was not signing her name to the notes and trust deeds. Why, if not for fraudulent purposes, did she thus give her name and so sign these papers? She says she supposed it was necessary because the deed was in that name. She should have given her true name, and it was a fraud to conceal it. If an unmarried woman, a widow, using her former name, were to so act, would not all persons say that such person was guilty of fraud? That concealing their own name and the use of the name of another, or a fictitious name, is evidence of deliberate, intentional fraud? Would any one credit the pretense that the party supposed he was acting properly? Then, why should this be distinguished from the supposed case?

We are clearly of opinion that plaintiff in error was guilty of fraud in misrepresenting her name, in using a fictitious name, and also in concealing her name, when she must have known that defendant in error would not have loaned the money and taken the trust deeds, without her husband joining with her in their execution, if she had given her true name and disclosed the fact that she was married.

Plaintiff in error testified her husband told her to come from Burlington to Galesburg and do the best she could; that she transacted the business and got the loan before she returned. When she got back she told him she had transacted her business satisfactorily. Now, it is but a reasonable inference to suppose she consulted with her husband in reference to this business, and it would not be a violent presumption to conclude it was planned and arranged between them that she should pass herself by the name of her former husband in procuring the loan, and this would be more easily done as she was known by that name by her neighbors. It is not probable she would take so important a step without consulting with her husband as to the manner in which it should be done.

We are unable to find any feature in this case that commends it to our sense of right. To permit plaintiff in error to retain the

money and property would be unjust in the extreme, and surely cannot comport with equity and good conscience. It is not denied that if plaintiff in error intentionally committed a fraud she would be estopped to deny the effect of the execution of the deeds of trust. That she, in fact, committed a fraud, there would seem to be no doubt, and if permitted to escape liability on her deeds, she would have consummated a palpable wrong. She purchases property, borrows money to pay for it by pledging it, and then refuses to pay, and insists that the instruments pledging it are void, although she says she then acted in good faith, and intended to bind the property for the payment of the money.

This court, in the case of *Oglesby Coal Co. v. Pasco*, 79 Ill. 164, reviewed the authorities, and announced the rule that a married woman may preclude herself from denying the truth of her representations in cases of torts, but where her conduct relates to contract, there can be no estoppel. So, in the cases of *Schwartz v. Saunders*, 46 Ill. 18, and *Anderson v. Armstead*, 69 id. 452, it was held that where a wife fraudulently permitted her husband to represent himself as the owner of her separate property, and procure mechanics to make valuable improvements thereon, without disclosing her ownership or repudiating his authority, she is estopped afterward from denying his authority to cause the improvements to be made, when the mechanics seek to enforce their liens for payment of the amount due them for work done on the faith of the husband's authority.

The true doctrine is, that contracts and agreements of married women in reference to their real estate, when not joined therein by their husbands, where such agreement is free from fraud, cannot be enforced in law or in equity. But where married women make such contracts or agreements by fraudulent means, and thus obtain inequitable advantages, a court of chancery will hold them estopped from setting up and relying on their coverture to retain the advantage. The court will require them to execute and perform the contract, if executory, or prevent them from avoiding it if executed, or will compel them to place the other party *in statu quo*, before they will be allowed to rescind or repudiate such agreements or contracts. Whether the one or the other form of relief will be granted must depend upon the equities of the case.

Here, plaintiff in error, by fraudulently concealing her marriage, and by declaring she was a widow when asked the question by the

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agent of defendant in error, gained an inequitable and unjust advantage of defendant in error, if she shall be permitted to retain the money she thus obtained and also to recover the land. She must be held to pay the money, or a lien for the same will be enforced against the premises she professed to mortgage to secure its payment. She must be held estopped from relying on her coverture to escape its payment.

We perceive no error in the record, and the decree of the court below must be affirmed.

Decree affirmed.

SCOTT, J., dissented.

RACE V. OLDRIDGE.

(90 ILL. 360.)

Exemption — head of a family.

Under a statute exempting property from distress, a widow, keeping a boarding house, with a female friend residing with her, and female servants, besides the boarders, is the "head of a family." (*See note, p. 80.*)

TRESPASS. The opinion states the facts. The plaintiff had judgment below.

David S. Pride, for appellants.

Dent & Black, for appellee.

WALKER, J. Appellants present three points for decision. The first, for giving an instruction for appellee; the second, in refusing an instruction asked by appellants; and the third, that the damages are excessive. It appears that appellee leased from one of appellants seven rooms in the building 47 La Salle street, Chicago, at \$65 per month. The lease was made on the 1st of November, 1874, and on the 2d day of March following, appellants issued and had levied a landlord's warrant. It was levied on the household property of appellee.

It is claimed, by appellee, that she was the head of a family, and the property was exempt from distress. She was a widow, keeping

a boarding-house, and there lived with her without wages, and as one of the family, a lady and friend of appellee, and she had two female servants, besides boarders. It is not claimed she had paid any rent, and on a trial before a justice of the peace under the distress warrant, a jury found that there was \$200 due appellants. Appellee thereupon appealed to the Circuit Court, and the property was returned to her. She, afterward, brought trespass against appellants, and, on a trial in the Circuit Court, the jury rendered a verdict in favor of appellee for \$350, upon which, after overruling a motion for a new trial, the court rendered judgment, and defendants appeal.

The instruction complained of, as given for appellee, informs the jury, that if she was the keeper of a boarding-house, she was entitled to hold property exempt from distress, to the amount of \$100, suitable to her business. And if she was the head of a family, she was entitled to hold the articles enumerated in the statute, exempt from levy under the distress warrant. And if the property was so exempt, or any part of it, in making the levy, she was deprived of the benefit of the exemption, and was entitled to recover.

It is claimed that this instruction left the jury to determine the legal question whether appellee was the head of a family and entitled to the exemption as such. That, as well as the question of whether she was the keeper of a boarding-house, was one of fact. The instruction was almost in the language of the statute, and was unobjectionable. If appellants had desired, they might have asked, and had given, an instruction informing the jury what is required to constitute the head of a family, but they failed to do so, and have no right to complain of the instruction, as it asserts a strictly legal proposition applicable to the facts of the case.

But the question arises whether the jury did not find that she was the head of a family contrary to the evidence and the instruction. It is urged, that although she was at the head of and controlling the establishment, there was no family, and consequently, she was not the head of a family; that the statute was intended to, and only embraces parents and children as constituting a family when living together; that a person at the head of a household consisting of such person and servants, is not the head of a family; that such persons cannot constitute a family. According to the etymology of the word, it would be, clearly, a family. Lexicograph-

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ers derive the word from the Latin word *familia*, which means "the whole of the slaves in a household." *Familus* means a slave. And the primary meaning, as given by Worcester, is "persons collectively who live together in a house or under one head; household." The primary meaning, as given by Webster, is "the collective body of persons who live in one house and under one head or manager; a household, including parents, children and servants, and, as the case may be, lodgers or boarders." Thus, it is seen that the word has a broad and comprehensive meaning in general use. Bouvier says, the word has a restricted sense, which only includes the father, mother and children; but in a more enlarged sense it includes all individuals who live under the authority of another, and includes servants of a family. Thus it is seen, its legal meaning differs but little from its general acceptance.

That appellee was the head of this household is manifest. And it would seem to be clear that it constituted a family, in the ordinary acceptance of the term. But was that the sense in which the term is used in the 52d chapter of the Revised Statutes? It is insisted, that it must be so held under the case of *Strawn v. Strawn*, 53 Ill. 263. There, it was held, in setting apart the widow's award, that the family consisted of the widow, several of her children who were of age, but resided with her, and her servants. But *Phelps v. Phelps*, 72 Ill. 545; s. c., 22 Am. Rep. 149, is referred to as announcing a different rule. We do not so understand the case. In it there was no occasion to discuss the question of whether servants were a part of the family, and there were children for whom the award was claimed, they constituting the family. And in this latter case, *Strawn v. Strawn*, *supra*, was referred to approvingly and without any modification. In that class of cases and under that statute, servants do not compose a part of the widow's family.

But it may be said, that the policy governing in the adoption of the two statutes is different. They are both in favor of the family, and both operate against the creditor. They both are designed to enable the head of the family to keep its members together and to support them; and hence the articles of property enumerated may be held in despite of creditors. And it seems to be conceded, that both statutes apply alike to the widow and minor children. And if both statutes must receive the same construction to that extent, why not to the full extent? No valid reason is perceived.

We apprehend that no one would dispute the widow's right, under either statute, to claim its benefits for a minor child adopted into the family as their own by the husband and wife. Such child would thereby become a part of the family, whether the most limited or more liberal meaning is given to the word. And no reason is perceived why a female friend of the family, going into it as one of its members by arrangement of all parties before the death of the husband, and so continuing with the widow after his death, should not be regarded as a member of her family. Nor why servants employed by her to perform household duties should not be so regarded. A family consisting alone of the husband and wife, all will concede, is embraced within the provisions of the statute, and if so, why not a widow of such a husband after his death, where she is the head of a household consisting of herself and servants? If the statute was designed to enable a husband to support his wife, why not extend the same protection to her, that she may support herself? The widow's claim is as strong, and is, certainly, as much within the reason of the statute, when she is the head of a family, as is that of the husband.

We are, therefore, of opinion that the friend of appellee and her two female servants were each a part of the family, and that appellee was the head of the family, within the meaning of the statute, and she was entitled to its benefits.

The instruction of appellants, which the court refused to give, announced a rule directly the opposite of the views which we have here expressed, and it was properly refused.

[Omitting the other point.]

Judgment affirmed.

NOTE BY THE REPORTER.— See *Rasarc v. Hart*, 18 Kans. 340; s. c., 26 Am. Rep. 72; *Vanderhorst v. Bacon*, 38 Mich. 669; s. c., 31 Am. Rep.

In *Calhoun v. Williams*, Supreme Court of Appeals of Virginia, July, 1879, 9 Rep. 60, it was held that a single man, who keeps house and has no other person living with him than servants or employees, is not the "head of a family" or "householder" within the meaning of the statutes creating exemptions. The relation of master and servant does not constitute a family. The court said: "The homestead article of the Constitution of Virginia has been judicially construed, both by the Federal and State courts, to confer a personal privilege upon the 'householder or head of a family,' and the question, and only question, in this case is, is the appellant, who claims the benefit of this provision of the Constitution, a householder or head of a family? The term was evidently employed by the framers of the Constitution in the sense in which it is commonly used. The term 'household' literally means the inmates of the house, the family, those whom the house holds. The term is frequently used in the sacred Scriptures, especially in the epistles of the New Testament, which, in the English version, is the best standard of the meaning of our language in common use. And the term 'household' is so used in common parlance, and is

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friendly correspondence by letter. What is more usual than to send messages of regard or affection by the writer to the household? Such messages are universally meant for the family—the inmates of the house. And if they constitute the household, who can be meant by the 'householder' but the 'head of a family.' But whilst we hold that by the 'householder' is meant the head of a family, we do not mean to say that every head of a family must be necessarily a householder. But the whole scope of the article shows that the privilege was intended, not so much for the benefit of the person to whom it is given, as for the benefit of his family; to enable the person to whom it is given to use it to save his family from suffering and want." "The family may consist of a wife and children, or of other persons who may stand in a state of dependence in the family relation. Or it may consist of persons standing in either of these relations to the head of the family, whether the father, or mother, or a brother, or a sister, or other relation, is the head; but they must be persons who are dependent, in some measure, on the head for support, and who have an interest in his holding his property, and would be prejudiced by its seizure and sale under execution or other process, and who would be benefited by its exemption. *Bowne v. Wilt*, 19 Wend. 475; *Thompson on Homst.*, § 66; and see 31 Tex. 680; *Lynch v. Pooz*, 40 Ga. 173; 11 Iowa, 226; *Marsh v. Lazenby*, 41 Ga. 153."

A merchant, unmarried, who has a rented store in which he sleeps, is not a "householder." *Brown v. State*, Mississippi Supreme Court, March-April, 1880.

In *Roco v. Green*, 50 Tex. 483, it was held that a married daughter, with her children, residing with her mother, formed no such constituent member of the family as to entitle her and her children to the homestead on the death of the mother.

In *Whitehead v. Tapp*, 60 Mo. 415, it was held that any man who has a wife is the head of a family, within the meaning of the homestead act, although his wife may have deserted him, and may be residing in another State, and he may himself be living in improper relations with another woman.

PETILLON V. HIPPLE.

(90 Ill. 490.)

Contract—wager—jurisdiction to set aside.

Chancery has jurisdiction to restrain the enforcement of an unexecuted and illegal wager contract, but it must be clearly alleged and proved that the stakes are not paid over.*

BILL to restrain stakeholder from paying over stakes. The opinion states the facts. The bill was dismissed below.

Omar Bushnell, for appellant.

George A. Gibbs and *Rushton M. Dorman*, for appellee.

WALKER, J. It appears that appellant, in the month of October, 1876, made a bet of \$50 on the result of the presidential election, which occurred on the 7th day of the following November, with

* To same effect, *Gilmore v. Woodlucck* (60 Me. 119), 31 Am. Rep.

one Campbell. Subsequently, in the same month, he made a similar bet of \$100 on the result of the same election, with the same person. Complainant and Campbell each placed in the hands of appellee \$150 as a stake. Soon after the election complainant became dissatisfied with the manner in which it had been conducted and called on Campbell for the purpose of withdrawing the stakes thus deposited, and withdrawing and rescinding the bets, and had repeatedly so requested of Campbell, but he had refused.

It is alleged that complainant had demanded of appellee the return of \$150 thus deposited by complainant, but appellee refused to return the money to him; that complainant fears and believes the stakeholder would pay the \$150 deposited with him as aforesaid to Campbell unless he be restrained by order of the court; that complainant "greatly fears and believes that a suit and judgment at law against said Jesse Hipple, for the money deposited as aforesaid, would be wholly worthless, and said money wholly lost to your orator by such a course, and so charges the truth to be."

The bill prayed an injunction inhibiting Hipple from paying the money deposited by complainant to Campbell or any other person, but that he be compelled to pay it to complainant, and for other or further relief. A temporary injunction was granted and perfected.

At the return term, defendant, Hipple, appeared and demurred to the bill. On a hearing on the demurrer, the court held the bill insufficient and dismissed it for want of equity. Thereupon complainant prayed and perfected an appeal to this court.

It is urged by appellant that this case is governed by section 131 of the Criminal Code. It provides that all contracts of every description made or entered into, where the whole or a part of the consideration shall be for any money, property or other valuable thing won on the games specified, on any election or unknown or contingent event whatever, shall be void and of no effect. It is contended that this is a contract, the consideration of which was a bet on the presidential election, and is void. Of this there would seem to be no doubt. But the question arises, whether the mere fact, that the agreement to bet and that the winner should have the whole stake is void under the statute, confers jurisdiction on a court of equity to enjoin the stakeholder from paying it to the winner and decree him to pay the portion put up by complainant to him.

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That section makes no provision as to the manner in which the contract shall be avoided.

The next section provides that chancery may take jurisdiction when the loser sues to recover back the money or property lost and paid to the winner. But it will be observed that this section only relates to money, property, etc., lost and paid on gaming, and not to prevent unexecuted contracts from being enforced. That section has no application to gaming contracts not fully performed and executed. Nor does the preceding section in terms confer jurisdiction on a court of chancery. If that court can take cognizance of a case like the present, it is because of its general jurisdiction, or because that section impliedly confers jurisdiction.

In *Raroden v. Shadwell*, Amb. 269, Lord HARDWICKE held, under the 9 Anne, making all securities for money won at play void, that chancery would take jurisdiction and afford relief. In that case Shadwell had won £500 of complainant at backgammon, for which he some time afterward gave his bond and subsequently paid a part of the money. The report of the case states that the chancellor decreed with great clearness, and said, "By statute 9th Anne, all securities for money won at play are made void, consequently the payment under any such security cannot be supported."

A comparison of section 131 of our Criminal Code will show it to be almost a literal copy of that part of the 9th of Anne under which that decree was rendered. Hence it is seen that the court took jurisdiction from its general powers, or under section 3 of that act, which requires all persons to answer and discover under bills that should be preferred under the act.

In the British act it is provided that chancery may take jurisdiction for discovery. In theirs, it is in a different section. So it is in ours. Sections 131 and 132 of our Criminal Code were, previous to the revision of 1874, in the chapter entitled "Gaming," and both formed a part of that act.

In the case of *Damus v. Quailles*, Litt. Sel. Cas. 489, it was held that a court of equity would not, under the statute of Kentucky, sustain a bill for the recovery of money paid on a gaming contract, on the mere ground that it was so lost. But it was said, that anterior to any legislation on the subject of gaming, which was not prohibited by the common law, "chancery watched gaming contracts with a jealous eye, and would frequently lay hold of slight circumstances to set them aside, such as the enormity of the de-

mand, from which imposition would be presumed, or the fact that the sum won or lost was beyond the estate and degree of the parties, would frequently induce the chancellor to interfere. * * * Since the passage of the statutes of Virginia and this country, upon the subject, all such contracts are treated as they ought to be, and are placed upon the grade of base contracts, infected with turpitude of consideration, and are declared void. Hence equity has frequently set them aside when they were executory only, and has perpetually enjoined judgments founded upon securities given on such consideration." Numerous authorities are cited in support of the proposition, which fully sustain it.

It would, therefore, seem to follow that chancery will assume jurisdiction to prevent the enforcement of unexecuted contracts of this character. Nor does the fact that both parties are guilty of a breach of a penal statute matter. See *Davidson v. Givens*, 2 Bibb, 200, where this question is discussed, and the court holds that on principle, independent of precedent, the court should exercise jurisdiction, but refers to adjudged cases which sustain the jurisdiction. We are, therefore, of opinion that the court of chancery has jurisdiction to restrain the enforcement of gaming contracts.

It is, however, claimed that the allegations of the bill are insufficient to warrant the relief, and that the demurrer for that reason was properly sustained. It is insisted that the bill fails to show that appellee had not paid the money to Campbell when the suit was brought. The bill alleges that the money was deposited with appellee by appellant, and that the latter demanded it of him, and he refused to restore it, and it prays an injunction to restrain him from paying it to Campbell. It also alleges that appellant fears that appellee will pay the money to Campbell. These allegations are too loose and indefinite to authorize a decree in favor of complainant. Suppose the evidence should show that the bet was made, the deposit placed in appellee's hands, a demand made, and a refusal to restore it, but no more, would it justify a decree to restore it to appellant? In the supposed case there would be nothing to show that the money had not been paid to Campbell before the demand was made, or even that the money had not been restored to appellant before or after the demand was made. If appellee, before any demand or notice, had paid the money, according to the terms of the bet, to Campbell, he surely should not be held liable to appellant. The bill should have stated that the money was still in

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the hands of appellee. The nearest approach to such an allegation is that complainant fears, unless appellee should be restrained by order of the court, he would pay it to Campbell. The rules of pleading, as all know, require that the grounds for relief shall be clearly and directly alleged and positively stated. This falls far short of the requirements of the rule. We are clearly of opinion that the bill is fatally defective. The rules of practice only require that the allegations and proofs shall agree, and if the allegations of the bill were all proved precisely as made, the evidence would not require that the relief should be granted if a trial were had on the bill.

The party is not required to prove more than is alleged, nor could relief be granted if more were proved, without amending the bill to conform to the proofs.

The decree of the court dismissing the bill must be affirmed.

DICKEY, J. I concur in the conclusion in this case, but not in the grounds assigned for the same.

Decree affirmed.

MACLAY V. HARVEY.

(90 III. 535.)

Contract — by letter — when complete.

Defendant offered, by letter sent through the mail, to engage the plaintiff in his employment, stating terms, and asking for a reply by return mail. The plaintiff received the letter on the 22d of March and next day gave a postal card, accepting the offer, to a boy to be mailed, but he neglected to mail it until the 25th. *Held*, that defendant was not bound by his offer, nor was he bound after receiving the postal card to notify her that it was not in time; nor was he estopped by his mere subsequent intention to accept her services and an unsuccessful attempt to see her. (*See note, p. 40.*)

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

John J. Glenn and J. M. Kirkpatrick, for appellant.

Stewart, Phelps & Grier, for appellee.

SCHOLFIELD, J. Appellant brought assumpsit against appellee in the court below, on an alleged contract whereby the latter em-

ployed the former to take charge of the millinery department of his store in Monmouth, in this State, for the season commencing in April and ending in July, in the year 1876, and to pay her therefor \$15 per week.

The judgment was in favor of appellee, and appellant now assigns numerous errors as grounds for its reversal.

In our opinion, the case may be properly disposed of by the consideration of a single question. Appellant's right of recovery is based entirely upon an alleged special contract, and unless there was such a contract the judgment below is right, however erroneous may have been the rulings under which it was obtained.

After some preliminary correspondence, which is not before us, appellant, who was then residing in Peoria, received from appellee the following by mail:

"MONMOUTH, ILL., *March 9, 1876.*

Miss L. MACLAY, PEORIA, ILL.—I have been trying to find your address for some time, and was informed last evening that you were in Peoria. I write to inquire if you intend to work at millinery this season, and if you have made any arrangements or not. If you have not can you take charge of my stock this season, and if we can agree I would want you for a permanent trimmer.

Please notify me by return mail, and terms, and we can confer further.

Yours in haste,

JOHN HARVEY,

Formerly JNO. HARVEY & Co., when you trimmed for me."

Appellant's reply to this is not before us. She says she stated her terms in it and thereafter appellee wrote her the following, which she also received by mail:

"MONMOUTH, ILL., *March 21, 1876.*

Miss L. MACLAY, PEORIA, ILL.—Your favor was received in due time, and contents noted. You spoke of wages at \$15 per week and fare one way. You will want to go to Chicago I presume, and trim a week or ten days.

I would like for you to trim at H. W. Wetherell's or at Keith Bros. I will give you \$15 per week and pay your fare from Chicago to Monmouth, and pay you the above wages for your *actual time* here in the house at that rate per *season*.

I presume that the wholesale men will allow you for your time in the house. You will confer a favor by giving me your answer by return mail.

Yours,

JOHN HARVEY."

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Appellant says she received this in the afternoon, and replied the next day by postal card, addressed to appellee, at Monmouth, as follows:

“PEORIA, *March 23.*”

Mr. HARVEY — Yours was promptly received, and I will go up to Chicago next week, and when my services are required you will let me know. Very respectfully, L. MACLAY.”

Appellant did not place this in the post-office herself, but she says she gave it to a boy who did errands about the house of her sister, with whom she was then staying, directing him to place it in the office. The postmark on the card, which is shown to be always placed on mail matter the same day it is put in the office, shows that the card was not mailed until the 25th of March.

Appellee receiving no reply from appellant, on Monday morning, March 27, went to Peoria and endeavored to engage another milliner, and failing in this, endeavored to find appellant, but was unable to do so, and then returned to Monmouth, when he received appellant's postal card, which had come to the office there during his absence. On Wednesday night, of the same week, appellee left Monmouth for Chicago, arriving at the last-named place on the following morning, Thursday, March 30. Finding that appellant was neither at Keith Bros. nor at Wetherell's, he proceeded to employ another milliner, and on the same day, and before leaving Chicago, wrote and mailed a letter directed to appellant's address at Peoria, notifying her of that fact, but this letter, in consequence of appellant's absence from Peoria, she did not receive for some time afterward.

The millinery season commences from the 5th to the 10th of April and ends from the 20th of June to the 4th of July, as shown by the evidence. Appellee had not laid in his spring stock when he was corresponding with appellant, and he started to New York, from Chicago, for that purpose, on the evening of the day on which he addressed the letter to appellant notifying appellant of his employment of another milliner, the evening of the 30th of March. Appellant says she left Peoria for Chicago on Friday, which must have been the 31st of March. On arriving at Chicago she went to Wetherell's, and failing to get employment there, did not go to Keith Bros., but went to another house in the same line of business, where she remained some days, and on the 8th of

April she notified appellee, by letter, that she was sufficiently informed as to the "new ideas of trimming" and was ready to enter his service. Appellee replied to this, reciting the disappointments he claimed to have met with on her account, and again notifying her that he did not require her services.

If a contract was consummated between the parties, it was by the mailing of appellant's postal card on the 25th of March. Appellee's letter of the 21st cannot be regarded as the consummation of a contract, because it restates the terms with some variation, though it may be but slight, and requires an acceptance upon the terms thus stated. This, until unequivocally accepted, was only a mere proposition or offer. *Hough v. Brown*, 19 N. Y. 111.

It was said by the Lord CHANCELLOR in *Dunlop v. Higgins*, 1 H. L. Cas. 387: "Where an individual makes an offer by post, stipulating for, or by the nature of the business having the right to expect, an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it. When a person seeks to acquire a right he is bound to act with a degree of strictness, such as may not be required where he is only endeavoring to excuse himself from a liability." This is regarded as a leading case on the question of acceptance of contract by letter, and the language quoted we regard as a clear and accurate statement of the law, as applicable to the present case. It is clear here, that the nature of the business demanded a prompt answer, and the words "you will confer a favor by giving me your answer by return mail" do, in effect, "stipulate" for an answer by return mail. *Taylor v. Rennie*, 35 Barb. 272.

The evidence shows that there were two daily mails between Peoria and Monmouth, one arriving at Monmouth at 11 o'clock, A. M., and the other at 6 o'clock, P. M., and it did not require more than one day's time between the points. Appellee's letter to appellant making the offers, it will be remembered, bears date March 21st. Assuming the date of appellant's postal card (which, she says, was written on the morning after she received appellee's letter), to be correct, she received appellant's letter on the evening of the 22d. Appellee was, therefore, entitled to expect a reply mailed on the 23d, which he ought to have received on that day, or at farthest,

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by the morning of the 24th; but appellant's reply was not mailed until the 25th. It does not relieve appellant of fault that she gave the postal card to a boy on the 23d, to have him mail it. Her duty was not to place an answer in private hands, but in the post-office. The boy was her agent, not that of appellee, and his negligence in mailing the postal card was her negligence.

The question whether it would not have equally subverted appellee's object had he treated the postal card of appellant as the consummation of a contract is irrelevant. Appellant seeks to recover upon the strict letter of a special contract, and it is therefore incumbent upon her to prove such contract. It is required of her, as we have seen, to prove an acceptance of appellee's offer within the time to which it was limited — that is to say, by the placing in the post-office of an answer unequivocally accepting the offer in time for the return mail, which she did not do. Appellee was therefore under no obligation to regard the contract as closed. He might, it is true, have done so, but he was not legally bound in that respect, nor was he legally bound to notify appellant that her acceptance had not been signified within the time to which his offer was limited. She is legally chargeable with knowledge that her acceptance was not in time, and in order to fix a liability thereby upon appellee, it was incumbent upon her, before assuming that appellee waived this objection, to ascertain that he in fact did so.

Appellee was led by the postal card of appellant to believe that he would, when he arrived at Chicago on Thursday, find her either at Wetherell's or Keith Bros. Had he done so, it was his intention to treat the contract as closed; but she was not there, and this intention was not acted upon, and so is to be considered as if it had never existed. Appellee not finding appellant at Wetherell's or Keith Bros., as she had left him to believe he would, had no reason to assume that she was, in good faith, acting upon the assumption that her postal card had closed the contract, and he cannot therefore be held estopped from denying that it was not posted in time. In view of the lateness of the season, and the danger to appellee's business from delay, of all which appellant was aware, it cannot be said appellee acted with undue haste in engaging another milliner.

The judgment is affirmed.

Judgment affirmed.

DICKEY, J., dissented.

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NOTE BY THE REPORTER.—The following propositions in respect to contracts by letters are established by the cases:

1. Where the offer is made by letter, and is accepted by letter posted within a reasonable time, the contract is complete, although the acceptance may be delayed or may not be received, owing to the fault of the post. *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Duncan v. Topham*, 8 C. B. 225; *Adams v. Lindsell*, 1 B. & Ald. 681; *In re Imperial Land Co. of Maracalla, Harris'* case, L. R., 7 Ch. App. 587; *Townsend's case*, L. R., 13 Eq. 148; *Potter v. Sanders*, 6 Ilare, 1; *Stocken v. Collin*, 7 M. & W. 515; *Hobbs's case*, L. R., 4 Eq. 9; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390; *Trevor v. Wood*, 36 N. Y. 307; *Abbott v. Shepard*, 43 N. H. 14; *Hutchinson v. Bakersman*, 3 Mete. (Ky.) 99; *Hamilton v. Lyscoming Ins. Co.*, 5 Barr, 339; *Levy v. Cohen*, 4 Ga. 1; *Falls v. Gailther*, 9 Port. 614; *Averill v. Hodge*, 19 Conn. 436; *Wheat v. Cross*, 31 Md. 99; a. c., 1 Am. Rep. 28; *Potts v. Whitehead*, 5 C. B. Green, 55; *Washburn v. Fletcher*, 43 Wis. 152. The case of *British Am. Tel. Co. v. Columbia*, L. R., 6 Ex. 108, must be regarded as of no authority. The gist of that decision is thus stated by KELLY, C. B.: "It appears to me that if one proposes to another by a letter through the post, to enter into a contract for the sale or purchase of goods, or as in this case, of shares in a company, and the proposal is accepted by letter, and the letter put into the post, the party having proposed the contract is not bound by the acceptance of it until the letter of acceptance is delivered to him, or otherwise brought to his knowledge, except (in some cases) where the non-receipt of the acceptance has been occasioned by his own act or default." The like doctrine is held in Massachusetts, *McCulloch v. Eagle Ins. Co.*, 1 Pick. 273 (disapproved by both Story and Parsons), and in Tennessee, *Gillispie v. Edmondston*, 11 Humph. 553.

The latest English case illustrating proposition 1 is *Household Fire & Carriage Accident Ins. Co. v. Grant*, C. P. Div. It was there held that a contract is binding upon the proposer as soon as a letter of acceptance, properly directed to him, has been posted by any person to whom the proposal has been made, notwithstanding such letter never reaches him, provided that there is no unreasonable delay in accepting the proposal, and that the ordinary and natural mode of transmitting the acceptance is through the post. The opinion is as follows:

LOFTY, J. This action is brought to recover £94 15s. for balance due on 100 shares in plaintiff's company applied for by the defendant. The defendant denies his liability. On the 30th September, 1874, the defendant, who acted for the plaintiffs at Swansea, applied through the manager for 100 shares, and handed him a written application for shares in the usual form. The manager laid the application before the plaintiffs, and an allotment letter was prepared in the usual form. The defendant swore he never received this letter, or any notice of calls or dividends. His name was duly entered on the list of shareholders. Evidence was given on behalf of the plaintiffs to prove the postage of the allotment letter of the 20th October. The defendant swore he had not received any letter about the shares until the 19th March, 1877. I asked the jury if they thought the letter of allotment of the 20th October was in fact posted; they replied in the affirmative. I also asked them if they thought the letter of allotment was in fact received by the defendant; to this they replied in the negative. It was urged by Mr. Finlay, for the defendant, that the letter of application was sent by hand, and there was no request to be answered by post. The letter of application, it will be observed, is in the usual form, and contains the usual particulars of name and address, and having regard to the position of the plaintiff's office and the defendant's residence, the ordinary and natural mode of transmission of the allotment letter would be through the post. The question raised in this case is, whether the contract between the plaintiffs and the defendant was complete when the letter accepting the defendant's offer was put into the post by the plaintiffs, or not until it was actually received by the defendant. The question is difficult, and the decisions are conflicting. It appears to me, however, that regard being had to the general inclination of the authorities and to mercantile convenience, the plaintiffs are entitled to succeed. I will refer only to a few of the leading cases. In *Dunlop v. Higgins*, 1 H. L. Cas. 381, the proposal did not describe any time, but the nature of it implied the answer must be speedy. The acceptance was not posted by the earliest post. The court decided that the contract was binding on the proposer. Lord COTTENHAM appears to have thought that the contract was absolutely concluded by the posting the acceptance (within the prescribed, namely, a reasonable time), and

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that it mattered not what became of it afterward. In *Duncan v. Topham*, 8 C. B. 223, not long afterward, WILDE, C. J., MAULE, J., and CRESWELL, J., seem to have so understood it, so that the contract would be binding, though the letter did not arrive at all. In the case of *The British and American Telegraph Company v. Colson*, L. R., 6 Exch. 108; 23 L. T. Rep. (N. S.) 668, it was found as a fact that the letter of allotment was never received. The court held the defendant was not bound, and endeavored to restrict the effect of *Dunlop v. Higgins*. In the *Imperial Land Company of Maracilles, Harris'* case, L. R., 7 Ch. 447; 23 L. T. Rep. (N. S.) 781, the letter of allotment was duly received, but in the mean time the applicant had written a letter withdrawing his application on the ground of the delay in answering. The lords justices held the applicant was bound on the authority of *Dunlop v. Higgins*, with which they thought it difficult to reconcile *The British and American Telegraph Company v. Colson*. In the case of *Droghda v. The Metropolitan Railway Company*, L. R., 2 H. of L. 601, Lord BLACKBURN says: "So again when in *Harris'* case a person writes a letter and says, 'I offer you an allotment of shares,' and he expressly or impliedly says, 'If you agree with me, send an answer by post,' then as soon as he has sent that answer by the post, and put it out of his control, and done an extraneous act which clinches the matter, and shows beyond all doubt that each side is bound, I agree that the contract is perfectly plain and clear." And again, at page 602: "I take it that which was said 300 years ago and more is the law to this day, and is quite what MELLISH, L. J., in *Harris'* case accurately states, that when it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post this letter the offer is accepted." Acting upon these cases, I came to the conclusion that the contract here was complete on the posting of the allotment letter, and that it is immaterial whether the defendant actually received that acceptance of his offer. There is doubtless hardship caused to the proposer if the acceptance does not come to hand, but against this he may guard himself by making the proposal expressly conditioned on the arrival of the answer within a definite time. It would be difficult to exaggerate the mischievous consequences to the commercial world which would follow if it were held that a contract was not complete until the letter accepting the offer had reached the proposer, and that it might be revoked at any time until the letter accepting it had been actually received.

This case was affirmed in the Court of Appeal, July 1, 1877, by THESIGER and BAGGALLAY, L. JJ., BRANWELL, L. J., dissenting, 41 L. T. (N. S.) 298. The importance and interest of the question, and the careful examination of the conflicting English authorities warranted our publishing the opinions in full. They are as follows:

THESIGER, L. J. In this case the defendant made an application for shares in the plaintiff company, under circumstances from which we must imply that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post. The company did allot him the shares, and duly addressed to him and posted a letter containing the notice of allotment; but upon the finding of the jury, it must be taken that the letter never reached its destination. In this state of circumstances, LOPEZ, J., has decided that the defendant is liable as a shareholder. He based his decision mainly upon the ground that the point for his consideration was covered by authority binding upon him, and I am of opinion that he did so rightly, and that it is covered by authority equally binding upon this court. *Dunlop v. Higgins*, 1 H. L. Cas. 447, is of course the leading case on the subject. It is true that Lord COTTENHAM might have decided that case without deciding the point in this. But it appears to me equally true that he did not do so, and that he preferred to rest, and did rest, his judgment as to one of the matters of exception before him upon a principle which embraces and governs the present case. If so, this court is as much bound to apply that principle, constituting as it did a *ratio decidendi*, as it is to follow the decision itself. The exception was, that the lord justices general directed the jury in point of law, that if the pursuers posted their acceptance of the offer according to the usage of trade, they were not responsible for any casualties in the post-office establishment. This direction was wide enough in its terms to include the case of the acceptance never being delivered at all, and Lord COTTENHAM, in expressing his opinion that it was not open to objection, did so after putting the case of a letter containing a notice of dishonor being posted to the holder of a bill of exchange in proper time, in which case he said (at page 399), "Whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post-office he is not

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responsible." In short, Lord COTTENHAM appears to me to have held that, as a rule, a contract formed by correspondence through the post is complete as soon as the letter accepting an offer is put into the post, and is not put an end to in the event of the letter never being delivered. My view of the effect of *Dunlop v. Higgins*, is that taken by JAMES, L. J., in *Harris's* case, where at page 783, L. T. Rep.; L. R. 593, he speaks of the former case as "a case which is binding upon everybody, and in which every principle argued before us was discussed at length by the lord chancellor in giving judgment, in which he (meaning the lord chancellor) arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract; that is to say, the moment one man has made the offer, and the other has done something binding himself to that offer, then the contract is complete, the instant of completion being that in which the letter accepting the offer is delivered to the post, and neither party can afterward escape from it." MELLISH, L. J., also took the same view. He says (at page 783 L. T. R.; L. R. 593) in *Dunlop v. Higgins* the question was directly raised whether the law was truly expounded in the case of *Adams v. Lindell*, and the House of Lords approved of the ruling in that case. Lord Chancellor COTTENHAM said in the course of his judgment, that in the case of a bill of exchange notice of dishonor given by putting a letter into the post at the right time had been held quite sufficient, whether that letter was delivered or not, and he referred to *Stocken v. Collins*, 10 L. J. 217, Ex.; 7 M. & W. 514. on that point, he being clearly of opinion that the rule as to accepting a contract was exactly the same as the rule as to sending notice of dishonor of a bill of exchange. He then referred to the case of *Adams v. Lindell*, and quoted the observation of Lord ELLENBOROUGH. That case, therefore, appears to me to be a direct decision that the contract is made from the time when it is accepted by post." Leaving *Harris's* case for the moment, I turn to *Duncan v. Trapham* in which CRESSWELL, J., told the jury that if the letter accepting the contract was put into the post-office, and lost by the negligence of the post-office authorities, the contract would nevertheless be complete, and both he and WILDE, C. J., and MAULE, J., seem to have understood this ruling to have been in accordance with Lord COTTENHAM's opinion in *Dunlop v. Higgins*. That opinion, therefore, appears to me to constitute an authority directly binding on us. But if *Dunlop v. Higgins* were out of the way, *Harris's* case would still go far to govern the present. There it was held that the acceptance of the offer at all events binds both parties from the time of the acceptance being posted, and so as to prevent any retraction of the offer being of effect after the acceptance has been posted. Now, whatever in abstract discussion may be said as to the legal notion of its being necessary in order to the effecting of a valid and binding contract that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless, therefore, a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are to be brought together at one and the same moment. This was pointed out by Lord ELLENBOROUGH in the case of *Adams v. Lindell*, which is a recognized authority upon this branch of law. But on the other hand, it is a principle of law as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance which only remains in the breast of the acceptor, without being actually or by legal implication communicated to the offerer, is no binding acceptance. How, then, are these elements of law to be harmonized in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the post-office as the agent of both parties, and it was so considered by Lord ROMILLY in *Hebb's* case, L. R., 4 Eq. 9, where in the course of his judgment he said: "*Dunlop v. Higgins* decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the post-office is the common agent of both parties." Also ALDERSON, B., in *Stocken v. Collins*, a case of notice of dishonor, and the case referred to by Lord COTTENHAM, says: "If the doctrine that the post-office is only the agent for the delivery of the notice were correct, no one could safely avail himself of that mode of transmission." But if the post-office be such common agent, then it seems to me to follow that as soon as the letter of acceptance is delivered to the post-office, the contract is made as complete and final and ab-

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absolutely binding as if the acceptor had put his letter into the hands of a messenger, sent by the offerer himself as his agent to deliver the offer and receive the acceptance. What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offerer, a principle which has been distinctly negatived? This difficulty was attempted to be got over in *British and American Telegraph Company v. Colson*, which was a case directly on all-fours with the present, and in which KELLY, C. B., at page 115, is reported to have said: "It may be that in general, though not in all cases, a contract takes effect from the time of acceptance, and not from the subsequent notification of it. As in the case now before the court, if the letter of allotment had been delivered to the defendant in the due course of the post, he would have become a shareholder from the date of the letter, and to this effect is *Butter v. Sanders*. And hence perhaps the mistake has arisen that the contract is binding upon both parties at the time when the letter is written and put into the post, although never delivered, whereas, although it may be binding from the time of acceptance, it is only binding at all when afterward duly notified." But with deference I would ask how a man can be said to be a shareholder at a time before he was bound to take any shares; or, to put the question in the form in which it was put by MELLISH, L. J., in *Harris' case*, at page 735, L. T. R.; L. R. 594, how there can be any relation back in a case of this kind as there may be in bankruptcy. "If," as the lord justice said, "the contract after the letter has arrived in time is to be treated as having been made from the time the letter is posted, the reason is that the contract was actually made at the time when the letter was posted." The principles laid down in *Harris' case*, as well as in *Dunlop v. Higgins*, can really not be reconciled with the decision in *The British and American Telegraph Co. v. Colson*. JAMES, L. J., in the passage I have already quoted (at p. 735, L. T. R.; L. R. 532) affirms the proposition that when once the acceptance is posted neither party can afterward escape from the contract, and refers with approval to *Hebb's case*. There a distinction was taken by the master of the rolls that the company chose to send the letter of allotment to their own agent, who was not authorized by the applicant for shares to receive it on his behalf, and who never delivered it; but he at the same time assumed that if, instead of sending it through an unauthorized agent, they had sent it through the post-office, the applicant would have been bound, although the letter had never been delivered. MELLISH, L. J., really goes as far, and states forcibly the result in favor of this view. The mere suggestion thrown out at the close of his judgment, when stopping short of actually overruling the decision in *British and American Telegraph Company v. Colson*, that although a contract is complete when the letter accepting an offer is posted, yet it may be subject to a condition subsequent that if the letter does not arrive in due course of post then the parties may act on the assumption that the offer has not been accepted, can hardly, when contrasted with the rest of his judgment, be said to represent his own opinions as to the law upon the subject. The contract, as he says (at page 735, L. T. R.; L. R. 596; L. J. 628), "is actually made when the letter is posted." The acceptor in posting the letter has, to use the language of Lord BLACKBURN, in *Brogden v. Metropolitan Railway Company*, L. R., 2 App. Cas. 668, "put it out of his control, and done an extraneous act which clenches the matter, and shows beyond all doubt that each side is bound." How then can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties or unmake the contract? To me it appears that in practice a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer, and I can see no principle of law from which such an anomalous contract can be deduced. There is no doubt that the implication of a complete, final and absolutely binding contract being formed as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in any view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconven-

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time or hardship. An offerer, if he choose, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post, he trusts to a means of communication which as a rule does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. On the other hand, if the contract is not finally concluded except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which dispatch is as a rule of the greatest consequence, would be occasioned, for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination. Upon a balance of convenience and inconvenience, it seems to me, applying with slight alterations the language of the Supreme Court of the United States in *Taylor v. Merchants' Fire Insurance Company*, 9 How. Sup. Ct. (U. S.) 393, more consistent with the acts and declarations of the parties in this case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication which the parties themselves contemplated, instead of postponing its completion till the notice had been received by the defendant. Upon principle, therefore, as well as authority, I think that the judgment of LOPES, J., was right, and should be affirmed, and that this appeal should therefore be dismissed.

BAGGALLAY, L. J. I am of opinion that this appeal should be dismissed. It has been established by a series of authorities, including *Dunlop v. Higgins* in the House of Lords, and *Harris'* case, in the Court of Appeal in Chancery, that, if an offer is made by letter which expressly or impliedly authorizes the sending of an acceptance of such an offer by post and a letter of acceptance properly addressed is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though there may be delay in its delivery. The question involved in the present appeal is whether the same principle should be applied in a case in which the letter of acceptance, though duly posted, is not delivered to the person to whom it is addressed. LOPES, J., was of opinion that the principle was applicable to such a case, and gave judgment in favor of the plaintiffs, and from such judgment the present appeal is brought. In support of his appeal the appellant relies upon the decision of the Court of Exchequer in the case of *Drill's and American Telegraph Company v. Colson*, to which for conciseness I will refer as *Colson's case*. I propose to consider *Dunlop v. Higgins* and *Colson's case* and *Harris'* case somewhat in detail, for the purpose of ascertaining whether the decision of the Court of Exchequer in *Colson's case* is consistent with the decisions of the House of Lords and of the lords justices in the other two cases, and with the principles upon which such decisions were based. The circumstances of *Dunlop v. Higgins* were as follows: After a preliminary correspondence, Messrs Dunlop & Co., who were merchants at Glasgow, addressed a letter on the 28th Jan., 1913, to Messrs. Higgins & Co., who carried on business at Liverpool, offering them 2,000 tons of iron pigs at 65s. per ton net. This letter reached Higgins & Co. at 8 A. M. on the 30th Jan., and on the same day they replied by letter, duly addressed to Dunlop & Co. in the following terms: "We will take the 2,000 tons of pig iron you offer us." It appeared by the evidence that the first post for Glasgow after the receipt by Higgins & Co. of the letter of Dunlop & Co. left Liverpool at 3 P. M. on the 30th, and that the post next following left at 1 A. M. on the 31st, and also that a letter dispatched by the former post would in due course arrive at Glasgow at 2 P. M. on the 31st, and by the latter in time to be delivered at 8 A. M. on the 1st February. The letter so sent by Higgins & Co. was posted after the hours were made up for the 3 P. M. post, and was dispatched by the 1 A. M. post on the 31st, and in due course it should have been delivered in Glasgow at 8 A. M. on the 1st Feb., but it was not in fact delivered until 3 P. M. on that day, the frosty state of the weather having prevented the train from Liverpool arriving at Warrington in time to meet the down train to Glasgow. It appeared that Higgins & Co. by mistake dated their letter as of the 31st Jan. instead of the 30th. On the 1st Feb., after the receipt of the letter of Higgins & Co. accepting the offer, Dunlop & Co. wrote to Higgins & Co.: "We have your letter of yesterday's day, but are sorry we cannot now enter the 2,000 tons; our offer of the 29th not being accepted in course." The iron was not delivered, and Higgins & Co. brought their action for breach of contract. The defense of Dunlop & Co. was, that

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their letter of the 30th should have been answered by the first post, viz., by that which left Liverpool at 3 p. m. on the 30th; but that at any rate they were not bound to wait for a third post delivered at Glasgow at 2 p. m. of the 1st Feb. On the trial before the lord justice general he admitted evidence to show that the letter of acceptance, though dated the 31st, was in fact written and posted on the 30th Jan., and he directed the jury that if Higgins & Co. posted their acceptance of the offer in due time, according to the usage of trade, they were not responsible for any casualties in the post-office establishment. It is important to bear in mind the terms of this direction, as it formed the substantial subject of appeal first to the Court of Session and then to the House of Lords. The jury found for the plaintiffs, that is to say, they found as a fact that the letter of Higgins & Co. was posted in due time according to the usage of the parties in their business transactions, and having so found they, under the direction of the judge, gave their verdict for the plaintiffs. Exceptions were thereupon taken by the defendants, and amongst other grounds of exceptions, they objected to the admission of evidence as to the posting of the letter on the 30th Jan., and to the direction of the lord justice general to which I have just referred. The exceptions were overruled by the judges of the first division, and from their decision the defendants appealed to the House of Lords; the appeal was dismissed and the ruling and direction of the lord justice general was upheld. Though the question in dispute between the parties was whether Higgins & Co. were responsible for the delay in the delivery of the post, it is to be observed that the direction of the judge went further, for he ruled that if their letter was duly posted they were not responsible for any casualties in the post-office establishment. During the argument Lord COTTENHAM said: "The question is whether putting in the post is not a virtual acceptance, though by the accident of the post it does not arrive;" and in moving the judgment of the house he observed: "If a party does all that he can do, that is all that is called for; if there is an usage of trade to accept such an offer, and to return an answer to such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done every thing that he was bound to do — how can he be responsible for that over which he has no control?" There is nothing in the language thus used by Lord COTTENHAM to suggest any distinction between a case in which there is delay in the delivery of the letter and one in which the letter is not delivered at all. But Lord COTTENHAM went on to illustrate his meaning, and did so in the following terms: "It is a very frequent occurrence that a party having a bill of exchange which he tenders for payment to the acceptor, and payment is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time it has been held quite sufficient; he has done all that he is expected to do as far as he is concerned; he has put the letter into the post, and whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post-office he is not responsible." Having regard to these passages in Lord COTTENHAM's judgment, it appears to me impossible to doubt that the proposition which he intended to affirm, and which was in fact his *ratio decidendi*, was this, that when the letter accepting the offer was duly posted the contract was complete, although it might be delayed in its delivery, or might never reach the hands of the party making the offer. I desire, however, to guard myself against being considered as participating in a view of the effect of the decision in *Dunlop v. Higgins*, which has been sometimes adopted, and as I think, without sufficient reason, namely, that in all cases in which an offer is accepted by a letter addressed to the party making the offer and duly posted, there is a binding contract from the time when such letter is posted. I do not take this view of the effect of the decision of *Dunlop v. Higgins*; on the contrary, I think that the principle established by that case is limited in its application to cases in which, by reason of general usage or of the relation between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized. In *Dunlop v. Higgins* the previous correspondence between the two firms was in my opinion quite sufficient not only to authorize the sending of the acceptance by post, but to point to it as the only mode in which, under the circumstances, such acceptance could be communicated; and it was in consequence of the jury finding as a fact that Higgins & Co. posted their acceptance of the offer of Dunlop & Co. in due time, according to the usage of their business transactions, that they found a verdict for the plaintiffs under the direc-

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tion of the judge. The principle involved in *Dunlop v. Higgins* was recognized by CRESWELL, J., upon the trial of the action in *Duncan v. Topham*. Upon that occasion he directed the jury that if the letter accepting the contract was put into the post-office and lost through the negligence of the post-office authorities, the contract would nevertheless be complete; and upon application in the same case to make absolute a rule nisi which had been obtained for a new trial, though the new trial was ordered upon other grounds, WILDE, C. J., and MAULE, J., expressed views to the same effect as the direction of CRESWELL, J. In that case the letter never reached the hands of the person to whom it was addressed. I proceed to consider the circumstances of *Colson's* case. They were as follows: On the 13th February, 1867, the defendant sent an application to the company, through the post, for an allotment of fifty shares, undertaking by his letter to pay the sum of 2l. per share on whatever number should be allotted to him. On the 14th of the same month fifty shares were allotted to him, and a letter informing him of such allotment was posted to his address, as given in his letter of application for shares, namely, 31 Charlotte street, Fitzroy square. Now a letter of application for shares in a public company, expressed in the usual form, must, I think, having regard to the usage in such matters, be considered as authorizing the acceptance of the offer by a letter through the post; as was expressed by LOPES, J., in the case now under consideration, such would be the ordinary mode of transmission of an allotment letter. The defendant, however, swore — and there was no reason to doubt the truth of his statement — that he never received the letter of allotment; that another person of the same name lived opposite to him in the same street; that about this time the numbers in the street were changed, his own being altered from 31 to 87; and that several letters then sent to him had never reached him. On the 28th February the plaintiffs, on being informed that the letter of allotment had never reached the defendant, sent him a duplicate, which he refused to accept; the action was then brought by the company to recover the 2l. per share. The jury found that the letter of allotment was posted to the defendant on the 14th February, but that he never received it, and that the second notice was not sent in reasonable time. The learned judge, BRAMWELL, B., thereupon directed the verdict for the plaintiffs, but gave the defendant leave to move to have it entered for himself, on the authority of *Finucane's* case which had then recently been decided by Lord ROMILLY. A rule nisi was accordingly obtained, and cause was shown on the 17th November, 1870, the court being composed of the lord chief baron and BRAMWELL and PIOTR, BB. Judgment was reserved, and on the 31st January, 1871, the rule was made absolute to enter the verdict for the defendant. The lord chief baron, in the course of his judgment, expressed himself as follows: "It appears to me that if one proposes to another by a letter through the post to enter into a contract for the sale or purchase of goods, or, as in this case, of shares in a company, and the proposal is accepted by letter, and the letter is put into the post, the party having proposed to contract is not bound by the acceptance of it until the letter of acceptance is delivered to him or otherwise brought to his knowledge, except in some cases, where the non-receipt of the acceptance has been occasioned by his own act or default." Now, unless the proposition so put forward by the chief baron is to be read with some qualification, it can hardly be considered as consistent with the decision in *Dunlop v. Higgins*, as such decision has been ordinarily understood. The view, however, taken by him of that decision does not appear to be in accordance with that generally taken, for, after alluding to the circumstances of *Dunlop v. Higgins*, he proceeded to express his entire concurrence in the decision of the Court of Session, and in the affirmance of it by the House of Lords, upon the ground, that in his opinion, the acceptance of the offer reached Dunlop & Co. in time, and that the House of Lords had acted upon the same view of the circumstances of the case. The distinction which he recognized between that case and the one then under consideration consisted in this, that whereas the letter of acceptance in *Dunlop v. Higgins* was received by the party making the offer in due time, that in *Colson's* case never reached its destination. PIOTR, B., did not deliver a separate judgment, but it was stated that he concurred in that of the lord chief baron. BRAMWELL, B., also commented upon the circumstances of *Dunlop v. Higgins*, and referred to several passages in the judgment of Lord COTTENHAM, including those which I have quoted; and he then expressed himself as follows: "It seems to me that the correct way to deal with these expressions is to refer them to the subject-matter, and not to consider them as laying down

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such a proposition as the plaintiffs here contended for; but that when the post may be used between two parties, it must be subject to those delays which are unavoidable." It would appear, then, that all the learned judges in the Court of Exchequer treated the case of *Dunlop v. Higgins* as one decided upon its special circumstances; and as not enunciating any general principle beyond what was necessary for dealing with such circumstances. I am unable to concur in this view. It may be that there were special circumstances in the case of *Dunlop v. Higgins* sufficient to have justified the decision of the House of Lords irrespective of the application of principle involved in the direction of the lord justice general; but the decision was not expressed to be based upon any such ground, but upon the approval and adoption of the direction of that learned judge. After a careful consideration of the judgments of the lord chief baron and of BRAMWELL, B., I can come to no other conclusion than that the decision in *Colson's* case is inconsistent with that of the House of Lords in *Dunlop v. Higgins*. If I am right in the conclusion it is not for me to choose between the two; I am bound by the authority of the decision of the House of Lords. But I pass on to consider the circumstances of *Harris's* case, which came before the lords justices in 1872. On the 5th March, 1866, Lewis Harris, of Dublin, applied to the directors of the Imperial Land Company of Marseilles, by a letter in the usual form, for an allotment of 200 shares, undertaking by his letter to accept that or any less number of shares that might be allotted to him. The directors allotted to him 100 shares, and early on the morning of the 15th March posted a letter to him at his address, as given in his letter of application, which was received by him at Dublin. He had, however, in the interval between the posting and the delivery of the letter, giving him notice of the allotment, written to the directors withdrawing his application and declining to accept any shares. Upon an order being made to wind-up the company, Mr. Harris was placed upon the list of contributors in respect of the 100 shares, and a summons having been taken out by him to have his name removed from the list, the summons was dismissed by MALINS, V. C. From such dismissal Mr. Harris appealed, but the decision of the vice-chancellor was upheld. In giving judgment JAMES, L. J., said that it appeared to him that the contract was completed the moment that the notice of allotment was committed to the post; and a similar view was expressed by MELLISH, L. J., who, after referring to the decision of the Court of Exchequer in *Colson's* case and stating that he had great difficulty in reconciling it with that of the House of Lords in *Dunlop v. Higgins*, observes, with reference to the last mentioned case, that the real question then before the House of Lords was, whether the ruling of the lord justice general was correct, and that the House of Lords held that it was. It is doubtless true, as was observed by both lords justices, that the decision in *Harris's* case was not necessarily inconsistent with that of the Court of Exchequer in *Colson's* case; but it is, I think, clear that, although the lords justices did not feel themselves called upon to express any dissent from the decision of the Court of Exchequer, as it was not necessary for the decision of the case before them that they should do so, they by no means recognized the propriety of the distinction drawn by the Court of Exchequer between *Dunlop v. Higgins* and *Colson's* case. I do not think it necessary to refer to *Finucane's* case, and other cases decided by Lord ROMILLY, in which he held that the posting of a letter of allotment which never reached its destination was not sufficient to constitute the applicant a contributory, further than in *Finucane's* case; *Dunlop v. Higgins*, and *Duncan v. Topham* were not cited, and that in the other two the circumstances were such that the master of rolls deemed himself justified in not following the decision in *Dunlop v. Higgins*. Indeed, in one of these cases, *Hebb's* case, he distinctly recognized the authority of the decision in *Dunlop v. Higgins*, which he considered to have been decided upon the ground that the post-office was the common agent of both parties. For the reasons which I have assigned I am of opinion that the principle established in the House of Lords in *Dunlop v. Higgins* is applicable to the case now under consideration, and that the decision of LOPES, J., should be affirmed. I desire, however, to add that, should I have not felt myself bound by authority, my own convictions were entirely in accordance with the principles which I consider to have been established by authority; and in saying this I bear in mind as well the very forcible remarks by the lord chief baron and my present colleague upon the subject of the mischievous consequences that might ensue from an adoption of this principle in certain suggested cases, as the equally forcible remarks made by MELLISH, L. J., as to the like consequences which would ensue in other cases if those principles were departed from.

BRAMWELL, L. J. The question in this case is not whether the post-office was a proper medium of communication from the plaintiff to the defendant. There is no doubt that it is so in all cases where personal service is not required. It is an ordinary mode of communication, and every person who gives any one the right to communicate with him gives the right to communicate in an ordinary, and so in this way; and to this extent, that if an offer were made by letter in the morning to a person at a place within half an hour's railway journey of the offerer, I should say that an acceptance by post, though it did not reach the offerer until the next morning, would be in time. Nor is the question whether, when the letter reaches an offerer, the latter is bound and the bargain made from the time the letter is posted or dispatched, whether by post or otherwise. The question in this case is different. I will presently state what in my judgment it is. Meanwhile I wish to mention some elementary propositions which, if carefully borne in mind, will assist in the determination of this case. First, where a proposition to enter into a contract is made and accepted, it is necessary, as a rule, to constitute the contract that there should be a communication of that acceptance to the proposer (per BRYAN, C. J., Year Book, 77 ed. 4. fo. 1 and 2, plac. 2, cited in Blackburn on Sales, p. 189). Secondly, that the present case is one of proposal and acceptance. Thirdly, that, as a consequence of or involved in the first proposition, if the acceptance is written or verbal — i. e., is by letter or message — as a rule, it must reach the proposer, or there is no communication, and so no acceptance of the offer. Fourthly, that if there is a difference where the acceptance is by letter sent through the post, which does not reach the offerer, it must be by virtue of some general rule or some particular agreement of the parties. As for instance, there might be an agreement that the acceptance of the proposal may be by sending the article offered by the proposer to be bought, or hanging out a flag or sign to be seen by the offerer as he goes by, or leaving a letter at a certain place, or any other agreed mode, and in the same way there might be an agreement that dropping a letter in a post pillar box or other place of reception should suffice. Fifthly, that as there is no such special agreement in this case, the defendant, if bound, must be bound by some general rule which makes a difference where the post-office is employed as the means of communication. Sixthly, that if there is any such general rule applicable to the communication of the acceptance of offers, it is equally applicable to all communications that may be made by post. Because, as I have said, the question is not whether this communication may be made by post. If, therefore, posting a letter which does not reach is a sufficient communication of acceptance of an offer, it is equally a communication of every thing else which may be communicated by post — e. g., a notice to quit. It is impossible to hold, if I offer my landlord to sell him some hay, and he writes accepting my offer, and in the same letter gives me notice to quit, and posts his letter, which however does not reach me, that he has communicated to me his acceptance of my offer but not his notice to quit. Suppose a man has paid his tailor by cheque or bank-note, and posts a letter containing cheque or bank-note to his tailor which never reaches, is the tailor paid? If he is, would he be if he had never been paid before in that way? Suppose a man is in the habit of sending cheques or bank-notes to his banker by post, and posts a letter containing cheques and bank-notes, which never reaches, is the banker liable? Would he be if this was the first instance of a remittance of the sort? In the case I have supposed the tailor and banker may have recognized the mode of remittance by sending back receipts, and by putting the money to the credit of the remitter. Are they liable with that? Would they be liable without it? The question then is, is posting a letter which is never received, a communication to the person addressed, or an equivalent, or something which dispenses with it? It is for those who say it is, to make good their contention. I ask why is it? My answer beforehand to any argument that may be urged is, that it is not a communication, and that there is no agreement to take it as an equivalent for or to dispense with a communication; that those who affirm the contrary say the thing which is not; that if BRYAN, C. J., had had to adjudicate on the case he would deliver the same judgment as that reported (*vide sup.*). That because a man who may send a communication by post or otherwise sends it by post, he should bind the person addressed though the communication never reaches him, while he would not so bind him if he had sent it by hand, is impossible. There is no reason in it. It is

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simply arbitrary. I ask whether any one who thinks so is prepared to follow that opinion to its consequences? Suppose the offer is to sell a particular chattel, and the letter accepting it never arrives, is the property in the chattel transferred? Suppose it is to sell an estate or grant a lease, is the bargain completed? The lease might be such as not to require a deed. Could a subsequent lessee be ejected by the would-be acceptor of the offer because he had posted a letter? Suppose an article is advertised at so much, and that it will be sent on receipt of a post-office order, is it enough to post the letter? If the word "receipt" is relied on, is it really meant that that makes a difference? If it should be said, Let the offerer wait, the answer is, May be he will lose his market meanwhile. Besides, his offer may be by advertisement to all mankind. Suppose a reward for information, and information posted does not reach, and some one else gives it and is paid, is the offerer liable to the first man? It is said that a contrary rule would be hard on the would-be acceptor, who may have made his arrangements on the footing that the bargain was concluded. But to hold as contended would be equally hard on the offerer, who may have made his arrangements on the footing that his offer was not accepted. His non-receipt of any communication may be attributable to the person to whom it was made being absent. What is he to do but to act on the negative that no communication has been made to him? Further, the use of the post-office is no more authorized by the offerer than the "send an answer by hand," and all these hardships would befall the person posting the letter if he sent it by hand. Doubtless in that case he would be the person to suffer if the letter did not reach its destination. Why should his sending it by post relieve him of the loss and cast it on the other party? It was said, if he sends it by hand it is revokable, but not if he sends it by post, which makes the difference. But it is revokable when sent by post; not that the letter can be got back, but that its arrival might be anticipated by hand or telegram, and there is no case to show that such anticipation would not prevent the letter from binding. It would be a most alarming thing to say it would, and that a letter honestly but mistakenly written and posted must bind the writer, if hours before its arrival he informed the person addressed that it was coming, but was wrong and recalled. Suppose a false but honest character given, and the mistake found out after the letter posted, and notice that it was wrong given to the person addressed. Then, as was asked, is the principle to be applied to telegrams? Further, it seems admitted that if the proposer said, "Unless I hear from you by return of post the offer is withdrawn," the letter accepting it must reach him to bind him. There is indeed a case recently reported in the *Times*, before the master of the rolls, where the offer was to be accepted within fourteen days, and it is said to have been held that it was enough to post the letter on the fourteenth, though it would and did not reach the offerer until the fifteenth. Of course there may have been something in that case not mentioned in the report; but as it stands it comes to this, that if an offer is to be accepted in June, and there is a month's post between the places, posting the letter on the 30th June will suffice, though it does not reach until the 31st July; but that case does not affect this. There the letter reached; here it has not. If it is not admitted that "unless I hear by return the offer is withdrawn," makes the receipt of the letter a condition, it is to say an express condition goes for naught. If it is admitted, is it not what every letter says? Are there to be fine distinctions, such as if the words are "unless I hear from you by return of post," etc., it is necessary that the letter should reach him, but "let me know by return of post," it is not, or if in that case it is, yet it is not where there is an offer without those words? Lord BLACKBURN said that MELLISH, L. J., actually stated that where it is expressly or impliedly stated in the offer, "You may accept the offer by posting a letter," the moment you post this letter the offer is accepted. I agree, and the same thing is true of any mode of acceptance offered with the offer and acted on—as firing a cannon, sending off a rocket. "Give your answer to my servant the bearer." Lord BLACKBURN was not dealing with the question before us; there was no doubt in the case before him that the letters had reached. As to the authorities, I shall not re-examine those in existence before *British and American Telegraph Company v. Colson*. But I wish to say a word as to *Dunlop v. Higgins*, as the whole difficulty has arisen from some expressions in that case. Mr. Finlay's argument and reference to the case when origi-

inally in the Scotch court has satisfied me that *Dunlop v. Higgins* decided nothing contrary to the defendant in this case. MELLISH, L. J., in *Harris'* case, says so at p. 596 of the Law Reports: "That case is not a direct decision on the point before us." It is true he adds that he has great difficulty in reconciling the case of *British and American Telegraph Company v. Colson* with *Dunlop v. Higgins*. I do not share that difficulty. I think that they are perfectly reconcilable, and that I have shown so. Where a posted letter arrives the contract is complete on the posting. So where a letter sent by hand arrives, the contract is complete on the writing and delivery to the messenger. Why not? All the extraordinary and mischievous consequences which the lord justice points out might happen if the law were otherwise when a letter is posted, and would equally happen when it is sent otherwise than by the post. He adds that, "The question before the house in *Dunlop v. Higgins* was whether the ruling of the lord justice clerk was correct," and they held it was. Now Mr. Finlay showed very clearly that the lord justice decided nothing inconsistent with the judgment in *British and American Telegraph Company v. Colson*. Since that case there have been two before MALINS, V. C., in the earlier of which he thought it "reasonable," and followed it. In the other, because the lords justices had in *Harris'* case "thrown cold water upon it," he appears to have thought it not reasonable. He says: "Suppose the sender of a letter says, 'I make you an offer; let me have an answer by return of post.' By return the letter is posted, and A has done all that the person making the offer requests." Now that is precisely what he has not done. He has not let him "have an answer." He adds: "There is no default on his part. Why should he be the only person to suffer?" Very true. But there is no default in the other, and why should he be the only person to suffer? The only other authority is the expression of opinion of LOPES, J., in the present case. He says the proposer may guard himself against hardship by making the proposal expressly conditional on the arrival of the answer within a definite time. But it need not be express nor within a definite time. It is enough that it is to be inferred that it is to be, and if it is to be it must be within a reasonable time. The mischievous consequences he points out do not follow from that which I am contending for. I am at a loss to see how the post-office is the agent for the parties. What is the agency? As to the sender it is merely to receive. But suppose it is not an answer but an original communication; what then? Does the extent of the agency of the post-office depend on the contents of the letter? But if the post-office is the agent of both parties, then the agent of both parties has failed in his duty, and to both. Suppose the offerer says, "My offer is conditional on your answer reaching me." Of whom is the post-office the agent then? But how does the offerer make the post-office his agent because he gives the acceptor an option of using that or any other means of communication? I am of opinion that this judgment should be reversed. I am of opinion that there was no bargain between these parties to allot and take shares, that to make such bargain there should have been an acceptance of the defendant's offer, and a communication to him of that acceptance, that there was no such communication, and that posting a letter does not differ from other attempts at communication in any of its consequences, save that it is irrevocable as between the poster and post-office. The difficulty has arisen from a mistake as to what was decided in *Dunlop v. Higgins*, and from supposing that because there is a right to have recourse to the post as a means of communication, that right is attended with some peculiar consequences; and also from supposing that because if the letter reaches it binds from the time of posting, it also binds though it never reaches. Mischievous may arise if my opinion prevails. It probably will not. As so much has been said on the matter that principle has been lost sight of, I believe equal if not greater will if it does not prevail. I believe that the latter will be only obviated by the rule being made nugatory by every prudent man saying, "Your answer by post is only to bind if it reaches me." But the question is not to be decided on these considerations. What is the law? What is the principle? If BRYAN, C. J., had had to decide this, a public post being instituted in his time, he would have said the law is the same now there is a post as it was before, namely, a communication to affect a man must be a communication, i. e., must reach him.

2. If the delivery of the letter of offer is delayed by the fault of the sender, the offer is

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extended until its arrival. *Adams v. Lindsell*, 1 B. & Ald. 681. This was where the letter of offer was misdirected by the sender's fault, and was consequently delayed two days in transmission, and before receipt of the acceptance he sold the goods to a third person. To the same effect, *McTier v. Frith*, 6 Wend. 103; *Averill v. Hedge*, 12 Conn. 436.

3. If undue delay or failure of delivery of the letter of acceptance is caused by the fault of the accepting party, there is no contract. As where the accepting party put his letter to be forwarded into the hands of an agent, the contract is not concluded so long as the letter remains in the agent's hands, even where the agent is the postmaster. *Thayer v. Middlesex Mut. F. Ins. Co.*, 10 Pick. 326; *Bryant v. Booz*, 55 Ga. 438.

4. The acceptance must be unconditional and in accordance with the terms of the offer, and given within the time prescribed, if any, by the offer. *Andrews v. Garrett*, 6 C. B. (N. S.) 222; *Jennings v. Mount Hope Ins. Co.*, 53 Me. 20; *Bruce v. Pearson*, 3 Johns. 534; *Tuttle v. Love*, 7 id. 470; *Holland v. Egre*, 2 Sim. & Stu. 194; *Thomas v. Blackman*, 1 Col. 201; *Eliason v. Henshaw*, 4 Wheat. 225; *Jordan v. Norton*, 4 M. & W. 155; *Roulledge v. Grant*, 4 Bing. 653; *Wentner v. Shairp*, 4 C. B. 404.

The most recent case illustrating this proposition is *First Nat. Bk. of Quincy v. Hale*, U. S. Supreme Court, Oct. Term, 1879, which is as follows: (1) A firm in Chicago wrote to a bank in Quincy which was cashing drafts on them by their agent, one Melson: "Hereafter we will pay drafts only on consignments. We cannot advance money a week in actual advance of shipment. The stock must be in transit so as to meet draft same day or the day after presented to us. This letter will cancel all previous arrangement of letters of credit in reference to G. W. Melson. Please acknowledge receipt of this, and oblige—." The bank replied by its cashier: "Your favor received. I note what you say. We have never knowingly advanced any money to Melson on stock to come in. Have always supposed it was in transit; have always taken his word. After this we shall require ship's bill." The firm did not reply to this letter. Held, that the firm did not accept the terms of the bank and could not rely on its promise in the reply sent by it as a contract for the firm's protection and benefit to not advance money on drafts without a shipping bill. To give it that effect early and explicit notice to the bank was necessary. *Adams v. Jones*, 12 Pet. 213; *McCullum v. Cushing*, 22 Ark. 543; *White v. Cortes*, 46 N. Y. 468; Story on Cont., § 1120. Consequently where the bank cashed drafts of Melson which were accepted and paid by the firm, held, that the firm could not recover back from the bank the amount paid, even though the drafts were cashed by the bank without the presentment of shipping bills, and there was no stock in transit against which they were drawn. Where there is misunderstanding as to the terms of a contract, neither party is liable in law or equity. *Baldwin v. Middleburger*, 2 Hall, 176; *Coles v. Bowne*, 10 Pal. 526; *Utley v. Donaldson*, 94 U. S. 48. Where a contract is a unit, and left uncertain in one particular, the whole will be regarded as only inchoate, because the parties have not been *ad idem*, and therefore neither is bound. *Appleby v. Johnson*, L. R., 9 C. P. 158. A proposal to accept or acceptance upon terms varying from those offered is a rejection of the offer. *Baker v. Johnson County*, 37 Iowa, 189; *Jennings v. Mount Hope Iron Co.*, 53 Me. 20; *Chicago and Great E. R. Co. v. Dane*, 43 N. Y. 240; *Suydam v. Clark*, 2 Sandf. Superior, 138. (2) After the letters were written the firm increased its members, two new partners being taken in without the knowledge of the bank. Held, that if the letter did constitute a contract with the firm as it was when they were written, it did not with the new firm. There was no privity between the bank and the new firm. A new party could no more be imported into the contract and imposed upon the bank without its consent than a change could be made in like manner in the other pre-existing stipulations. The bank might have been willing to contract with the firm as it was originally, but not as it was subsequently. Without its assent a thing was wanting which was indispensable to the continuity of the contract. *Barns v. Barron*, 61 N. Y. 39; *Grant v. Naylor*, 4 Cr. 224; *Bleeker v. Hyde*, 3 McLean, 279; *Taylor v. Wetmore*, 10 Ohio, 490; *Taylor v. McClung*, 2 Houst. (Del.) 94; *Hunt v. Smith*, 17 Wend. 179; *Cramer v. Higginson*, 1 Mason, 325; *Russel v. Perkins*, id. 365.

5. An immaterial addition to an acceptance does not prevent the taking effect of the contract. *Chee v. Beaumont*, 1 DeG. & S. 397; *Gibbons v. N. E. Met. Asylum District*, 11 Beav. 1; *Branson v. Stannard*, 41 L. T. (N. S.) 474. The latter case was as follows: The agent for an intending purchaser of property, having made an offer for it, received in

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reply a letter from the vendor's agent accepting the offer, and fixing a time for signing the contract. The purchaser's agent not having attended within the time named, the vendor refused to complete. *Held*, that the contract was complete, for that the naming of a time for signing a formal contract did not constitute a condition of the acceptance. *Dickinson v. Dodds*, L. R., 2 Ch. D. 463, distinguished. If the letters constitute a complete contract it will take effect in spite of a statement in the acceptance that a formal contract will be drawn up. *Bonnevell v. Jenkins*, 38 L. T. (N. S.) 581.

6. Acceptance must be within a reasonable time, unless a time is limited in the offer. The next day will answer. *Dunlop v. Higgins*, *supra*. But four months after will not. *Chicago, etc., R. Co. v. Danc*, 43 N. Y. 240.

7. An offer may be withdrawn before acceptance. *Routledge v. Grant*, 4 Bing. 653; *Honeyman v. Marryatt*, 21 Beav. 14; 6 H. L. Cas. 112; *Chinnock v. Marchioness of Ely*, 6 N. H. 1; *Hyde v. Wrench*, 3 Beav. 334; *Esbridge v. Glover*, 5 Stew. & Port. 284; *Faulkner v. Hebard*, 23 Vt. 432; *Beckwith v. Cheever*, 21 N. H. 41; *Burton v. Shotwell*, 13 Bush. 271. And so an acceptance may be retracted before or simultaneously with its receipt. *Dunmore v. Alexander*, 9 Shaw & Dunl. 190. Story says (Cont., § 498): "The rule is that if the proposition be made in writing, and sent by the post, the person making the offer can retract by a subsequent letter reaching the other party at any time before an answer of acceptance is written and put in the mail. But as soon as such answer is placed in the mail the contract is completely closed as to both parties. Although, therefore, a letter containing a retraction of the offer be actually on the way at the time when the letter of assent is mailed, yet the contract is closed, unless such letter of retraction be received prior to the mailing of such letter of assent." See *Wheat v. Cross*, 31 Md. 99; a. c., 1 Am. Rep. 28. As to retraction of acceptance, Story says (Cont., § 498): "The person assenting cannot, therefore, even stop his letter on the road after it is once mailed."

In *Byrne v. Tienhoven*, C. P. Div., March 6, 1880, 42 L. T. (N. S.) 371, it was held that the withdrawal of an offer, made and accepted by letters sent through the post, is inoperative if the notice of withdrawal does not reach the person accepting until after the letter of acceptance has been posted, unless authority has been given to notify a withdrawal by merely posting a letter. The material parts of the opinion are as follows:

LINDLEY, J. This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of 1,000 boxes of tin plates, pursuant to an alleged contract which I will refer to presently. The action was tried at Cardiff before myself without a jury, and it was agreed at the trial that in the event of the plaintiffs being entitled to damages they should be 375*l*. The defendants carried on business at Cardiff, and the plaintiffs at New York, and it takes ten or eleven days for a letter posted at either place to reach the other. The alleged contract consists of a letter written by the defendants to the plaintiffs on 1st October, 1879, and received by them on the 11th, and accepted by telegram and a letter sent to the defendants on 11th and 15th Oct., respectively. These letters and telegrams, so far as material, were as follows:

[Omitting them.]

These letters and telegrams would, if they stood alone, plainly constitute a contract binding on both parties. The defendants, in their pleadings, say that there was no sufficient writing within the statute of frauds, and that they contracted only as agents, but these contentions were very properly abandoned as untenable, and do not require further notice. The defendants, however, raise two other defenses to the action, which remain to be considered. First, they say that the offer made by their letter of the 1st Oct. was revoked by them before it had been accepted by the plaintiffs by their telegram of the 11th or letter of the 15th. The facts as to this are as follows: On the 8th Oct. the defendants wrote and sent by post to the plaintiffs a letter withdrawing their offer of the 1st. This letter, so far as material, was as follows: "8th Oct. 1879. — From Messrs. Leon Van Tienhoven and Co., Cardiff, to Messrs. Byrne and Co., New York. — Confirming our respects of the 1st inst., we hasten to inform you that, there having been a regular panic in the tin-plate market during the last few days, which has caused prices to run up about 25 per cent, we are reluctantly compelled to withdraw any offers we have made to our constituents, and must, therefore, also consider our offer to you for 1,000 boxes Hensols, at 17*s*. 6*d*., to be cancelled from this date. Yours faithfully, Leon Van Tienhoven and Co." This letter of the 8th Oct. reached the plaintiffs on the 20th Oct. On the same day the plaintiffs

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telegraphed to the defendants demanding shipment, and sent them a letter insisting on completion of the contract. This letter is followed by one from the defendants to the plaintiffs of the 25th Oct., refusing to complete. There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not. *Routledge v. Grant*, 4 Bing. 653. For the decision of the present case, however, it is necessary to consider two other questions, viz.: (1) Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent. (2) Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent. It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind notified cannot be regarded in dealings between man and man, and that an uncommunicated revocation is, for all practical purposes and in point of law, no revocation at all. This is the view taken in the United States (see *Taylor v. Merchants' Fire Insurance Company*, 9 How. Sup. Ct. Rep. 390, cited in Benjamin on Sales, pp. 56 and 59), and is adopted by Mr. Benjamin. The same view is taken by Mr. Pollock in his excellent work on the Principles of Contract, 2d ed., p. 17, and by Mr. Leake in his Digest of the Law of Contracts, p. 43. This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass, therefore, to the next question, viz., whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on the 1st Oct. The withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post the contract is completed the moment the letter accepting the offer is posted (*Harris' case*, 26 L. T. Rep. [N. S.] 781; 7 Ch. App. 557; *Dunlop v. Higgins*, 1 H. of L. Cas. 381), even although it never reaches its destination. *Household Fire Company v. Grant*, 41 L. T. Rep. (N. S.) 298; 4 Ex. Div. 216, qualifying, if not overruling, *British and American Telegraph Company v. Colson*, 23 L. T. Rep. (N. S.) 698; L. R., 6 Exch. 108. When, however, these authorities are looked at it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or in other words, he has made the post-office his agent to receive the acceptance and notification of it; but this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th Oct. is to be treated as communicated to the plaintiffs on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer both by telegram and by post, and they had themselves resold the tinplates at a profit. In my opinion the withdrawal by the defendants on the 8th Oct. of their offer of the 1st was inoperative, and a complete contract binding on both parties was entered into on the 11th Oct., when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn. Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail, no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles and practical convenience require that a person who has accepted an offer not known to him to have been revoked shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.

CHICAGO CITY RAILWAY COMPANY V. CITY OF CHICAGO.

(90 Ill. 573.)

Taxation — street railway company liable for assessments.

The rights, franchises and interests of a street railway company, chartered by the legislature and occupying a city street, by contract with the city, are liable to assessment for benefits in the widening of the street in which the track lies.

A PPEAL from an assessment. The opinion states the case. The assessment was confirmed below.

Hitchcock, Dupee & Judah, for appellants.

Joseph F. Bonfield, for appellee.

WALKER, J. The only question presented by this record is, whether the railway's rights in the streets, whatever they may be, are subject to assessments for benefits derived by widening State street, along which the company runs its cars. The company received its charter from the general assembly to lay a single or double track for a street railway, to be operated and used as such, but was required to obtain permission from the city to occupy the street for the purpose. An ordinance was adopted giving permission, and requiring among other things, that the company keep the portion of the street occupied by its tracks in repair.

On the 8th of September, 1873, the common council passed an ordinance for the widening of State street from Jackson to Harrison street, by condemning a strip of land twenty-seven feet wide along the east line of the street, thus making it 100 feet wide.

A petition was filed in the Superior Court of Cook county, and proceedings were had thereunder, resulting in a verdict and judgment for compensation for damages, amounting in the aggregate to the sum of \$84,299.62. Commissioners were appointed to make an assessment to pay the damages thus sustained, and they returned their assessment roll. It shows an assessment of "\$1,686 on the right of way, right of occupancy, franchise and interest of the Chicago City Railway Company in State street in the city of Chicago." This was for benefits the company would derive by widening State

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street at that point and along which their track was laid and their cars were run.

The company objected to the confirmation of the report as to the assessment made against it, but on a hearing of the objection the court confirmed the assessment. The company appeals, and questions the power of the city, under its charter, to levy and collect the assessment against the company.

It is claimed that the company has no such property or title to property as is embraced in the provision of the charter authorizing assessments on property benefited by such improvements.

In the case of *The City of Chicago v. Baer*, 41 Ill. 306, an assessment for paving a street was held valid because a horse railway company having their track, etc., in the street was not assessed for benefits. It was there held, "that the constitutional provision requiring equality of taxation applied as well to special assessments for improvements of this character as to any other for taxation; that when the burden is to be imposed upon those who are benefited by the proposed improvement, it must be imposed on all who are directly benefited, in the ratio of the benefits, since it would be a violation of the equality sought to be secured by the Constitution as well as of all just principles of taxation, to exempt a portion of those benefited and thereby increase the burden upon the remainder."

It was also said in that case: "Now it is true, as urged by counsel, that the railway company has not become the owner of any portion of the streets in fee, but it has certainly, through its charter from the legislature and its contract with the city, acquired a property in them of the most valuable character, which neither the legislature nor the city can take away without the consent of the company, and capable, like other property, of being sold and conveyed. The city council has made a contract with the company by which it has granted to the latter what is substantially a leasehold interest in a portion of this street for a term, by the original ordinance, of twenty-five years. * * * It has acquired rights in the street which neither any other person or company nor the general public possesses. It can now occupy the street in a manner which would not be permitted without the aid of legislation. It is wholly unnecessary to define, for the purposes of this case, what is the precise extent or nature of its property."

It was likewise said that the company had a franchise appurten-

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ant to the street, the right to occupy a portion of it so far as might be necessary to run its cars, for a long term of years; that the franchise and the right to occupy constituted a property fixed and immovable in its character, like realty, and recognized and protected by the law as fully as a fee simple in land, and from its character is capable of being substantially and directly benefited by the proposed improvement, and it should contribute its just share in common with other property upon the street.

The case of *Parmelee v. City of Chicago*, 60 Ill. 267, was a case where the company had constructed its track in the street and had agreed to keep the portion used by it in repair, and the city agreed to exempt the company from assessments for grading, paving, macadamizing, filling or planking the streets; it was held the company were liable to be assessed to pay for widening the street. This last case is similar to this, except in that it was held that the assessment on other property was invalid, because the property of the railway company was not assessed and made to bear its just proportion of the expense of widening the street according to the benefits received, whilst here it has been assessed for that purpose and to that extent. This assessment is in conformity to those decisions, and we are satisfied with the rule they announce, and must hold that they govern this case.

The judgment of the court below is affirmed.

Judgment affirmed.

DICKEY, J. Were this an open question I should be inclined to hold that the rights of railway companies are not property of such character as to subject it to such assessment. This class of assessments creates no personal liability upon the owner of the property assessed. This property is not capable of transfer by alienation. If subjected to sale for the amount assessed, the purchaser could acquire no right to use it.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

PULLMAN PALACE CAR CO. V. TAYLOR.

(65 Ind. 153.)

Contract — sleeping car company — continuous passage.

The plaintiff purchased of the defendant, a sleeping car company, at Indianapolis, a ticket purporting to entitle him to accommodations in a designated sleeping car, in a berth to be pointed out by the conductor, thence to New York city. A certain berth was accordingly assigned him, and designated on the ticket, but at Pittsburg the car was detached, and a different and less safe and comfortable berth was offered him in another car, which he declined. In an action for damages for breach of contract, *held*, that he was entitled to a continuous passage in the same car and berth, or in one equally safe, comfortable and convenient; and that it was no defense that the defendant simply rented the cars to the railway companies for the use of passengers.*

ACTION for breach of contract. The opinion states the case. The plaintiff had judgment below.

C. Baker, T. A. Hendricks, O. B. Hord and A. W. Hendricks,
for appellant.

C. W. Smith and R. O. Hawkins, for appellee.

WORDEN, J. Complaint as follows: "Harry Taylor complains of the Pullman Palace Car Company, a corporation engaged in the

*To same effect, *Kinsley v. Lake Shore & Michigan Southern R. R. Co.* (125 Mass. 54), 20 Am. Rep. 200, and note, 208; *Thorpe v. N. Y. C. & H. R. R. Co.*, post.

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business of carrying passengers as common carriers throughout the United States, and particularly between the cities of Indianapolis, in the State of Indiana, and New York, in the State of New York, and so engaged on and prior to the 31st day of March, 1874. That on said 31st day of March, 1874, this plaintiff engaged passage on one of the cars of the defendant, commonly known as a Pullman Palace or Sleeping Car, and selected his berth in said car, which berth was the lower berth in the center of said car, and known as berth 'Lower Six.' That said berth was preferable to other berths in said car, or other cars, as being more comfortable, and safer in case of accidents. That for his passage to the city of New York, in said berth in said car, he paid to the defendant the sum of five dollars, and in consideration of said payment of said sum of five dollars, the defendant undertook and agreed to carry the plaintiff from Indianapolis to New York, in said car and a said berth, and gave to this plaintiff their certain ticket or check in print, a copy of which is as follows:

Berth Check.		UPPER.	LOWER.
Jan.	1	1	1
Feb.	2	2	2
Mar.	3	3	3
Apr.	4	4	4
May	5	5	5
June	6	6	6
July	7	7	7
Aug.	8	8	8
Sept.	9	9	9
Oct.	10	10	10
Nov.	11	11	11
Dec.	12	12	12
	13	13	13
	14	14	14
	15		
	16		
	17		
	18		
	19		
	20		
	21		
	22		
	23		
	24		
	25		
	26		
	27		
	28		
	29		
	30		
	31		

The Sleeping Car Conductor will punch out, on the following Diagram, the date and the amount of room to which the holder of this check is entitled.

CAR

96

From

Indianapolis

To

New York.

\$5.00.

W. T. Cannon,

Conductor.

C

62913

UPPER.	LOWER.
1	1
2	2
3	3
4	4
5	5
6	6
7	7
8	8
9	9
10	10
11	11
12	12
13	13
14	14
A	A
B	B
C	C

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"On which ticket, on the diagram thereof, the conductor of the said car then punched, in the column of months, the month of March, and in the days of the month, the 31st, and in the columns designated 'Upper' and 'Lower,' the figure 6; thereby intending to express that the holder of said ticket was thereby entitled to a passage from Indianapolis to New York, on car No. 96, in lower berth No. 6, starting March 31st, for which he had paid the sum of five dollars, and that said diagram and ticket was received by this plaintiff as expressing such agreement.

"And the plaintiff further says, that afterward, while on said car, occupying said berth, *en route* for the city of New York, according to the terms of said agreement, the said plaintiff was notified by the agents of the defendant in charge of said car, that he must surrender and give up his said berth in said car, and take passage in another car in said train, and that said car No. 96 would be detached from said train, and would not be taken to New York; that in fact said car was so detached and left behind, and this plaintiff was compelled to remove his baggage and take passage in another car of the plaintiff's (*sic*) in said train.

"That in said last-named car, the berth corresponding to the one occupied by this plaintiff in car No. 96, and to which he was entitled from Indianapolis to New York, was occupied by another party, who had a prior right thereto, and this plaintiff was thus deprived of his said berth, and the defendant did not provide him any other accommodation or berth in said car, similar or equal in comfort and safety to those to which he was entitled, under his agreement, in said car No. 96, and the said defendant wholly failed, neglected and refused to provide him any berth or seat in said car, save the upper berth over the hind axle of said car, which was an uncomfortable and dangerous position to occupy. That this plaintiff refused to occupy such berth on account of its so being uncomfortable and dangerous; and this plaintiff was compelled to and did leave said sleeping or palace car, and was compelled to take passage in a common passenger car, conducted with said train, where there was no accommodation for passengers, similar to, or equal in comfort and safety to, those provided by said defendant by said car and berth in which this plaintiff engaged his passage from Indianapolis to New York; that by reason of said failure of said defendant to fully comply with her said agreement and undertaking, this plaintiff was deprived of sleep during the remainder of

his journey from Indianapolis to New York, and suffered great discomfort and annoyance and vexation, both of body and of mind, and injury to his health, so as to render him disqualified and unable to properly and successfully attend to business for the period of twenty-four hours after his arrival in the city of New York.

"Wherefore he says, by the reason of the fault, negligence and wrong-doing of the defendant, he has been damaged in the sum of four hundred and ninety-five dollars, for which sum, together with his costs, he prays judgment."

The defendant demurred to the complaint, for want of sufficient facts, but the demurrer was overruled, and exception taken.

[Omitting the answer.]

Demurrers were sustained to each of the several paragraphs of answer, and the defendant excepted. The defendant elected to stand on its answer and declined to answer further. Thereupon, says the record, the cause was submitted to the court for trial. This could only mean that the cause was submitted to the court for the assessment of damages, inasmuch as there was no issue of fact to try. The court assessed the plaintiff's damages at fifty dollars, and rendered judgment accordingly.

The judgment thus rendered at Special Term was affirmed at General Term.

[Omitting minor considerations.]

It is alleged in each paragraph of the answer that the defendant did contract with the plaintiff to furnish him sleeping-car accommodations from Indianapolis to New York, and did deliver to him the ticket described in the complaint, and punched as therein stated, and made with him no other contract, express or implied.

It seems to us to be clear, that the contract with the plaintiff imposed the obligation upon the defendant, to furnish the sleeping-car accommodations for a continuous trip from one point to the other, so that the plaintiff could go on with the continuous train, as he might be bound to do on the purchase of an ordinary railroad ticket without provision for stopping off. See *Dietrich v. The Pennsylvania R. R. Co.*, 71 Penn. St. 432; s. c., 10 Am. Rep. 711; *Oil Creek, etc., Railway Co. v. Clark*, 72 Penn. St. 231; *Cheney v. Boston and Maine R. R. Co.*, 11 Metc. 121; *State v. Overton*, 4 Zab. 435.

It also seems to us that the defendant was bound by the contract evidenced by the check set out and punched as it was, not merely

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to furnish sleeping-car accommodations for the trip, but to furnish the lower berth No. 6, in the particular car No. 96, or at least to furnish an equally desirable berth in the same locality, in another car of equal safety, convenience and comfort.

This is the plain legal effect of the contract. See *Terre Haute, &c., R. R. Co. v. Fitzgerald*, 47 Ind. 79.

It was for the particular berth in the car that the plaintiff paid his money. That berth was the one which, by the contract, he was to have. There is, doubtless, some choice in berths; and whether from mere caprice or from good reason the plaintiff chose and paid for that berth, he was entitled to have it. The defendant could not, without breach of its contract, deprive him of that berth, although it offered to furnish him another, any more than the plaintiff could have claimed another, if he had happened to change his mind and desire another.

This being the legal effect of the contract, we proceed to consider whether any defense is set up in any of the paragraphs of answer. If the defendant furnished the sleeper to be taken through by the railroad companies, and if the failure to take it through was solely the fault of the latter, the contract of the defendant may not have been broken, for as we have seen, the defendant did not contract for transportation.

By the allegations of the several paragraphs of answer, it does not appear to have been any fault of the railroad companies that the sleeper No. 96 was not taken through with the train that went on. On the contrary, it is expressly averred in the second and third paragraphs, that the defendant caused the sleeper mentioned to be detached from the train at Pittsburgh. This also is the fair inference from what is alleged in the first paragraph, in which it is averred that "said car No. 96 was left at said city of Pittsburgh, and the defendant was unable to furnish the plaintiff, in either of said other cars, lower berth No. 6," etc.

It clearly enough appears that the defendant failed to furnish the plaintiff with the sleeping car No. 96 beyond Pittsburgh; and that it failed to furnish him beyond that point with a berth in any other car, corresponding with lower berth No. 6 in that car, which it seems the plaintiff was willing to accept. The defendant, therefore, broke its contract with the plaintiff. This breach may have been induced by a desire on the part of the defendant to accom-

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modate a larger number of persons with sleeping-car conveniences; but this can be no legal justification of the breach.

We have been furnished by the appellant with a manuscript opinion in some cases, delivered by Judge BILLINGS of the Circuit Court of the United States for the District of Louisiana, which in some respects, as we think, strongly support the view we have taken. The principal case was that of *Simms v. Pullman Southern Car Co.* The plaintiffs had bought sleeping-car tickets from New Orleans to Philadelphia. The train which took the sleeper failed to go beyond Washington, where it stopped on account of riots. The plaintiffs sued for this failure, and there had been a trial and verdict for the defendant. The court said, among other things, in delivering its opinion on a motion for a new trial :

“The court construed the contract into which the defendants entered by the sale of the sleeping-car tickets as follows : That in the first place, they obligated themselves to have, throughout the entire line, as indicated upon their tickets, suitable cars to allow an uninterrupted transit. Secondly, that they obligated themselves to have provided such connections between the railroads intervening between the termini and the route indicated upon their tickets, as according to the regular trains running upon such roads, would permit a continuous transit. Thirdly, that they obligated themselves that these roads were so situated, manned and run, as according to the regularly established trains, admitted of a continuous passage over the route specified in the tickets which were sold. Fourthly, that they obligated themselves to furnish proper attendance on such cars, and that they would stop with sufficient frequency, and for a sufficient length of time, to allow passengers to take their meals.

“The court further instructed the jury, that if defendants had shown that they performed these obligations, that they furnished suitable cars, that proper connections over the roads which were operated, so as, from day to day, to have allowed — according to their ordinary trains — a continuous passage, and that notwithstanding all this, one of the roads, to wit, the Baltimore and Ohio road, refused or failed to send forward any train of cars from Washington to Philadelphia, on account of apprehensions of the riot, and that this refusal or failure was the result of no fault of the defendants, who had an adequate car in readiness to proceed, in that case they had performed all the obligations which they had undertaken.

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so far as they are connected with the passage of the plaintiffs. The gist of these instructions was, that the contract, on the part of the defendants, was not one for transportation; that that was a distinct contract made between the plaintiffs and the various railroads whose tickets they had purchased, and that the obligations on the part of the defendants, though connected with the transportation of the plaintiffs, were only such as have been enumerated. * * * I see no reason, after further examination of the case, to change the views which I entertained at the trial."

[Minor matters omitted.]

No error was committed in sustaining the demurrer to the several paragraphs of answer, nor is there any error in the record.

The judgment below is affirmed, with costs.

Judgment affirmed.

PITTSBURG, CINCINNATI AND ST. LOUIS R. W. CO. v. HOLLOWELL.

(65 Ind. 188.)

Carrier — failure to receive for carriage caused by armed strikers.

In an action against a common carrier for failure to receive and carry live-stock in pursuance of its agreement, it is a good defense that it was prevented from fulfillment solely by the armed violence of its late employees, whose wages had been reduced, and who had quit work and struck for higher wages.*

ACTION for damages for breach of contract to receive and transport live-stock. The opinion states the case. The plaintiff had judgment below.

N. O. Ross and H. D. Thompson, for appellant.

H. C. Allen and C. L. Henry, for appellee.

BIDDLE, J. Complaint by appellee, as a shipper against the appellant, as a common carrier, to recover damages for delay in receiving and transporting live-stock. The complaint originally contained three paragraphs, but the second one was withdrawn;

*To same effect, *Pittsburgh, Fort Wayne & Chicago R. R. Co. v. Haen* (84 Ill. 36), 25 Am. Rep. 423.

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the case, therefore, stands upon the first and third paragraphs. A demurrer, for the alleged want of facts, was overruled to each paragraph of the complaint. The appellant answered by a general denial, and six special paragraphs, numbered from one to seven inclusive. Demurrers were overruled to the second, third, fourth, fifth, sixth and seventh paragraphs. Reply in three paragraphs, to the second and third of which demurrers were overruled. Trial by the court, and finding for the appellee. Motion for a new trial overruled. The appellant excepted to the various rulings of the court. Judgment on the finding, and appeal.

. The second paragraph of answer was in the following words :

“For a second and further answer to the first and third paragraphs of complaint, the defendant says, that during the entire time of the delay in shipping the plaintiff's stock, as charged in said paragraphs of the complaint, a portion of the citizens of the State of Indiana were in rebellion against the laws and government of said State, and assembled together along the line of the defendant's railroad, over which it was necessary to pass to carry said stock to the place of its destination, to wit, East Liberty, Pennsylvania, with clubs, stones, pistols and other dangerous weapons, and with the use of force, threats and intimidation, drove the defendant's locomotive engineers, firemen, and other servants necessary to run a train, away from the defendant's trains, then ready and prepared to transport the plaintiff's hogs at the time agreed on ; and that said persons, so in open rebellion and armed as aforesaid, during all said delay, to wit, from said 26th day of December, 1873, until said 3d day of January, 1874, continued to assemble themselves together along the line of railroad as aforesaid, and with force and violence drove away from the engines and trains of defendant the engineers and firemen employed by the defendant to operate its trains ; and that the persons so in rebellion, and resisting the laws of the State of Indiana, and resisting the defendant in the lawful operations of its said railroad, were so numerous that the civil authorities of the State were unable to resist and suppress them ; and that it became necessary for the governor of the State of Indiana to call out the military force of the State to suppress them ; and that he did call out said military force, and suppressed said rebellion, on the 2d day of January, 1874 ; and that the defendant, as soon thereafter as it was possible to do so, to wit, on the 3d day of January, 1874, sent a proper train of cars to where said stock

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was to be reshipped from, and without further delay transported said stock to their place of destination. Wherefore the defendant says, it was prevented by the enemies of the government, in open rebellion, from transporting the plaintiff's hogs sooner than it did transport them as alleged in the complaint."

The third, fifth, sixth and seventh paragraphs of answer set up substantially the same facts as those averred in the second. The fourth paragraph was withdrawn.

The second paragraph of reply was pleaded to the second, third, fifth, sixth and seventh paragraphs of answer. It averred that the pretended rebellion, set up in the defendant's answer, was caused by a reduction of the wages of the engineers, firemen and employees of the defendant, which induced them to strike, or refuse to go to work; that they assembled peacefully, in a body, and demanded their wages restored, but neither offered nor threatened any resistance to the civil authorities of the State.

The third paragraph of reply is in the following words:

"And for third and further reply to the second, third, fifth, sixth and seventh paragraphs of defendant's answer, he says, that all the obstruction and disturbance that occurred, as set out in said answer, were caused by an unjust and oppressive order of said defendant, in cutting down and reducing the wages of her engineers, firemen and employees, and thus causing the said employees to refuse to work, and become sullen and turbulent; and that said employees assembled in a small body, and demanded a revocation of said order, and a restoration of their former wages; and that none but the employees of this defendant engaged in any way in said disturbance."

Upon the issues thus settled, the case was tried.

The only objection made to the complaint is that it does not aver any consideration for the contract to ship the stock, but it shows the relation of common carrier and shipper between the parties, and an agreement on the part of the appellee to furnish to appellant stock to be shipped, and on the part of the appellant to ship the stock, and that the stock was furnished at the proper depots, and a part of it loaded upon the appellant's cars. These facts show the contract, and a sufficient consideration to support it. We think the complaint is good. *Pittsburgh, etc., Ry. Co. v. Morton*, 61 Ind. 539.

The appellee insists that it is immaterial whether his second and

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third replies to the appellant's answer are good or not, because, as he also insists, the paragraphs of answer to which they were pleaded are not good.

It is generally held, that to exouse a common carrier the loss must happen from a strictly superior force, not merely human, unless it be the public enemy, the *vis major* of the civil law. Redf. on Carriers, § 25. But the carrier will be exempted from losses caused by public enemies, as by a hostile invasion and seizure or destruction of property, or by the capture of the carrier's vessel and cargo on the high seas by the men of war or commissioned privateers of the nations with which we are in open war.

"To make a public enemy, the government of the foreign country must be at war with the United States; for a mob, how numerous soever it may be, or robbers, whoever they may be, are never considered as a public enemy." Bouv. Dict., tit. Public Enemy.

Rioters and robbers and thieves and insurrectionists, though at war with social order, are not in this sense classed as public enemies. Though the force by which the carrier be opposed be never so great, as if an irresistible multitude of people should rob him, he is nevertheless chargeable.

Pirates upon the high seas, however, stand as an exception to this rule. They are considered the enemies of all civilized nations, and indeed of the human race, whose depredations upon a common carrier will excuse him from liability. Edw. on Bailments, 463. The carrier is answerable for loss caused by the irresistible force and violence of robbers and mobs; and thieves, rioters, insurgents, who are merely private depredators, are not considered public enemies in the legal sense of the term. Ang. on Carriers, §§ 191, 200.

It has long been settled in England that a common carrier is responsible for all losses, except such as are occasioned (to speak in the quaint language of the common law) "by the act of God or the king's enemies." The true reason is given by Sir WILLIAM JONES, namely, that the carrier's engagement is a public employment, which gives him easy facilities, and affords great temptations, to combine secretly with robbers to the infinite mischief of commerce, and extreme inconvenience to society. To which reasons may be added, that when goods are delivered to a carrier, they are no longer under the control of the owner. If they should be lost by the grossest carelessness of the carrier, or negligence and dishonesty of his servants, or be stolen by thieves in collusion with

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them, the owner would be unable to prove the facts, except by those who had committed the wrong, and who would thus be strongly tempted to excuse their master as well as themselves. Ang. on Carriers, §§ 149, 150, 191, 200.

The law against common carriers, where the goods are lost, seems severe, but its severity is necessary to the security of property, and the protection of commerce, and is founded in experience and the deepest wisdom.

The first case we find reported was under Charles II. It is this: The carrier loaded his vessel in the river Thames, for Cadiz, in Spain. She was manned by five sailors, which was sufficient to sail her. In the night-time came eleven persons, under pretense of pressing seamen for the king's service, and by force seized the sailors and took the goods. The case was compounded upon a final decision, but "it was agreed on all hands that the master should have answered, in case there had been any default in him or his mariners." *Morse v. Slue*, Vent. 190.

The first case reported in this State is *Walpole v. Bridges*, 5 Blackf. 222, wherein DEWEY, J., gives a construction to the phrase "Act of God," but does not define a public enemy. In this case it was held that the exception in a bill of lading, "unavoidable dangers and accidents of the road only excepted," did not restrict the general liability of a common carrier. The following cases support this view more or less directly: *Proprietors of the Trent Navigation v. Wood*, 3 Esp. 127, *Lane v. Cotton*, 1 Ld. Raym. 646, 652; *Bell v. Reed*, 4 Binn. 127, 5 Am. Dec. 398; *Murphy v. Staton*, 3 Munf. 239; *Ewart v. Street*, 2 Bail. 157; *McArthur v. Sears*, 21 Wend. 190; *Blackstock v. New York & Erie R. R. Co.*, 1 Bosw. 77.

But the strict rule contended for by the appellee is applicable to common carriers only after they have received the goods for transportation, and fail to deliver them at their destination, or when they are lost. In cases like the present, for delay in receiving and carrying the goods, the carrier is not an insurer, and is bound only by the general rule of liability for a breach of his contract, or of his public duty as a carrier, and may be excused for delay in receiving the goods, or in transporting them after they have been received, whenever the delay is necessarily caused by unforeseen disaster which human prudence cannot provide against, or by accident not caused by the negligence of the carrier, or by thieves and robbers, or an uncontrollable mob.

Under this view, we think the second, third, fifth, sixth and seventh paragraphs of the appellant's answer are each sufficient. *Pittsburgh, etc., R. W. Co. v. Morton*, 61 Ind. 539.

The appellant insists that the second and third paragraphs of the reply to its answer are both insufficient. As to the second paragraph we think this view is correct. The fact that a railroad company has reduced the wages of its employees cannot be held to justify or excuse a mob, composed of indiscriminate persons, in stopping a train of cars, and delaying the receiving of goods, or the transportation of freights; nor can the railroad company be held responsible for the consequences of such unlawful proceedings, when they cause such delay.

A majority of the court also hold the third paragraph of reply insufficient. They think that a fair construction of its averment means no more than that the employees committed the acts alleged against them in the reply, after they had refused to work for the company, and thus had severed their relations with the road, and had therefore ceased to be its employees.

If this is the fair construction of the reply, it is insufficient; but the writer of this opinion is constrained to differ from the majority of the court on this point. He cannot see how the language of the averments can fairly bear such a construction. The persons alleged to have created the disturbance and caused the delay are averred throughout the reply, to be the employees of the appellant, and the concluding sentence, which must be taken as referring to what precedes it, clearly avers "that none but the employees of the defendant engaged in any way in said disturbance." The reply, as the writer construes it, puts the fact whether the persons causing the delay complained of were the employees of the appellant or not, directly in issue, and as it was thus presented to the court for trial and found against the appellant, therefore, the judgment ought to be affirmed; for it is a well-settled principle of law that a delay caused by a "*strike*," or a mob, composed solely of the employees of a railroad company, as averred in the reply before us, will not excuse the company from receiving and carrying freight according to its contract or public duty. *Redf. on Carriers*, § 28; *Edw. on Bailments*, § 609; *Conger v. Hudson River R. R. Co.*, 6 Duer, 375; *Parsons v. Hardy*, 14 Wend. 215; *Blackstock v. New York and Erie R. R. Co.*, 20 N. Y. 48; *Conduct v. Grand Trunk Ry. Co.*, 54 id. 500.

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For the error in overruling the demurrer to the third paragraph of reply, the judgment must be reversed.

Other points not herein examined are presented by the record, but as it is scarcely possible that they will arise again, and as the law issues are now settled, we may be excused from deciding any other questions in the case.

The judgment is reversed, at the costs of the appellee; cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings according to this opinion.

Judgment reversed.

STATE V. ELDER.

(65 Ind. 282)

Criminal law — former acquittal — murder of unborn child — abortion.

To an indictment for an attempt to produce a miscarriage, an acquittal on an indictment for murder of an unborn child by an attempt to produce a miscarriage is no bar.

INDICTMENT for an attempt to produce a miscarriage. The defendant had judgment on demurrer. The opinion states the facts.

T. W. Woolen, attorney-general, *B. Burke*, prosecuting attorney, and *D. W. McKee*, for the State.

BIDDLE, J. The appellee was indicted for an attempt to produce a miscarriage on the body of Elizabeth Bradburn.

The indictment contains three counts.

The first count charges that "One Anthony Elder, on the 8th day of June, 1876, at said county and State aforesaid, unlawfully and willfully employed a certain instrument, known as a uterine sound, in and upon the person of one Elizabeth Bradburn, who was then and there a pregnant woman, by then and there inserting said instrument into the uterus of said Elizabeth Bradburn, and then and there and thereby attempting to rupture the placenta, with the intent then and there and thereby to produce the miscarriage of said Elizabeth Bradburn, the procuring of said miscarriage

not being then and there necessary to preserve the life of the said Elizabeth Bradburn."

The second count of the indictment is the same as the first, except that it charges the appellant with having done the acts "by the hand of one Jane Abbott."

The third count in the indictment charges that the appellant, on, etc., at, etc., "did then and there unlawfully and willfully administer to one Elizabeth Bradburn, who was then and there a pregnant woman, a large quantity of medicine, with intent then and there and thereby unlawfully to produce the miscarriage of the said Elizabeth Bradburn, the procuring of said miscarriage not being then and there necessary to preserve the life of the said Elizabeth Bradburn, contrary," etc.

The appellant pleaded to the indictment by a special answer of former acquittal. The answer is so redundant in its averments, and thereby made so long, that it is quite impracticable to set it out in this opinion; nor need we do so, as the only objection taken to it is that the offense set up therein, of which it is alleged the appellant was acquitted, was not the same offense as that charged against him in the present indictment. The charge against the appellant in the first count of the indictment in the former case, which is set out in the answer, was for murder in the first degree, averred in the following words:

"That the said Anthony Elder, on," etc., "at," etc., "did then and there unlawfully and feloniously, purposely and with premeditated malice, kill and murder a certain child, unnamed, of one Elizabeth Bradburn, by then and there unlawfully and feloniously and purposely employing a certain instrument, to the grand jurors unknown, upon the body of the said Elizabeth Bradburn, who was then and there pregnant with said child, by then and there inserting said instrument into the uterus of the said Elizabeth Bradburn, and passing it about the foetus, thereby causing the miscarriage of the said Elizabeth Bradburn and the death of said child."

The second count of the former indictment is the same as the first, except that the charge of murder is made in the second degree instead of the first.

The court, upon demurrer, held this answer sufficient. From this ruling the State appealed.

That no person shall be put in jeopardy twice for the same offense is a common-law principle, which, we believe, is incorpo-

rated into the Constitution of each of the States which compose the United States. This provision, however, has not been interpreted and applied uniformly throughout all the States. In some it has been held to mean no more than the common-law principle. In others it has been held that the offender can be prosecuted to final judgment but once upon the same state of facts, although they may be susceptible of a division into several offenses; that when the State has prosecuted the accused to final judgment on any one of such offenses the judgment shall be a bar to any other prosecution on the same state of facts. The English rule is, that when the facts necessary to convict upon the second prosecution would necessarily have convicted on the first, a final judgment on the first prosecution will be a bar to the second, but if the facts which will convict on the second prosecution would not necessarily have convicted on the first, then the first will not be a bar to the second, although the offenses charged may have been committed by the same state of facts; and we believe this rule is valid in all the States of the Union. While in some a more liberal rule is held in favor of the accused, which allows but one final judgment on the same state of facts, although they may include several offenses.

We believe the true rules, deducible from both principle and authority, to be,

1. When the facts constitute but one offense, though it may be susceptible of division into parts, as in larceny for stealing several articles of property at the same time, belonging to the same person, a prosecution to final judgment for stealing a part of the articles will be a bar to a subsequent prosecution for stealing any other part of the articles, stolen by the same act.

2. When the facts constitute two or more offenses, wherein the lesser offense is necessarily involved in the greater — as an assault is involved in an assault and battery, as an assault and battery is involved in an assault and battery with intent to commit a felony, and as a larceny is involved in a robbery — and when the facts necessary to convict on a second prosecution would necessarily have convicted on the first, then the first prosecution to a final judgment will be a bar to the second.

3. But when the same facts constitute two or more offenses, wherein the lesser offense is not necessarily involved in the greater, and when the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the first prosecu-

tion will not be a bar to the second, although the offenses were both committed at the same time and by the same act.

The following text-books and decisions will support the above rules : 1 Whart. Crim. Law, §§ 565, 566 ; 1 Bish. Crim. Law, § 1057 ; *Bruce v. State*, 9 Ind. 206 ; *Trittipio v. State*, 13 id. 360 ; *Jackson v. State*, 14 id. 327 ; *Wininger v. State*, 13 id. 540 ; *Hickey v. State*, 23 id. 21 ; *Hamilton v. State*, 36 id. 280 ; *Fritz v. State*, 40 id. 18 ; *Clem v. State*, 42 id. 420 ; s. c., 13 Am. Rep. 369 ; *Brinkman v. State*, 57 Ind. 76 ; *State v. George*, 53 id. 434 ; *Wilkinson v. State*, 59 id. 416 ; *Commonwealth v. Kinney*, 2 Va. Cas. 139 ; *King v. Emden*, 9 East, 437 ; *Commonwealth v. Squire*, 1 Metc. 258 ; *State v. Lewis*, 2 Hawks, 98 ; 11 Am. Dec. 741 ; *Price v. State*, 19 Ohio, 423 ; *State v. Stanly*, 4 Jones (N. C.), 290 ; *State v. Birmingham*, Busb. 120 ; *State v. Cooper*, 1 Green (N. J.), 361 ; *People v. Van Keuren*, 5 Park. Cr. 66 ; *Roberts v. State*, 14 Ga. 8 ; *State v. Keogh*, 13 La. Ann. 243 ; *State v. Townsend*, 2 Harring. 543 ; *Commonwealth v. Cunningham*, 13 Mass. 245 ; *State v. Benham*, 7 Conn. 414 ; *Holt v. State*, 38 Ga. 187 ; *Commonwealth v. Tenney*, 97 Mass. 50 ; *Hite v. State*, 9 Yerg. 357 ; *State v. Reed*, 12 Md. 263 ; *Wilson v. State*, 24 Conn. 57 ; *Durham v. People*, 4 Scam. 172 ; *King v. Vandercomb*, 2 Leach, 708, cited in 1 Lead. Crim. Cas. 516 ; *State v. Shepard*, 7 Conn. 54 ; *State v. Chaffin*, 2 Swan, 493 ; *Gillespie v. State*, 9 Ind. 380.

The answer we are considering falls under the third rule above stated. The lesser offense, namely, the charge in the present indictment, was not involved in the greater, namely, that charged in the former indictment, upon which the appellant was acquitted, as alleged in his answer. An indictment for the murder of the unnamed child of Elizabeth Bradburn is by no means the same as an indictment charging the employment of certain means, with the intent to procure the miscarriage of Elizabeth Bradburn, although the same means were used to commit the offense in both cases. The lesser offense is not involved in the greater ; the offenses are not committed against the same person, and bear no resemblance to each other, either in fact or intent ; the facts necessary to support a conviction on the present indictment would not necessarily have convicted, nor would they even have tended to convict, upon the former indictment. We cannot adopt the rule held in some States, that the accused cannot, in any case, be convicted but once upon the same facts when they constitute different offenses, whereas

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the lesser offense is not involved in the greater, and when the facts charged in the second prosecution would not convict upon the former. We think the third rule, announced above, in such cases, expresses the law.

[Omitting a technical point.]

The answer is insufficient. The court erred in holding it good.

The judgment is reversed, and the cause remanded, with directions to sustain the demurrer to the answer, and for further proceedings.

Judgment reversed and cause remanded.

ALLEN V. MARNEY.

(65 Ind. 398.)

Surety — bond delivered on condition.

A surety signed an appeal bond, and intrusted it to the principal on condition that it should also be signed by another whose name appeared in the body of the bond as a co-surety. The principal did not procure such additional signature, but erased that name and delivered the bond. *Held*, that the surety was not liable.*

ACTION on a bond. The opinion states the facts. The plaintiff had judgment below.

J. M. Boyle, C. M. Allen and H. S. Cauthorn, for appellants.

W. H. De Wolf and S. N. Chambers, for appellee.

WORDEN, C. J. The appellee, Jane E. Marney, recovered a judgment before W. H. Beeson, mayor of the city of Vincennes, against James S. Pritchett, for the recovery of certain real estate held over by Pritchett as tenant to Marney. Pritchett appealed to the Circuit Court, where Marney again recovered against him.

This action was brought by Marney, against Pritchett, Allen and Cauthorn, upon the supposed appeal bond given upon the above-mentioned appeal.

Allen and Cauthorn put in issue the execution of the bond by them respectively, by pleading duly verified. The cause was tried

*See *Outler v. Roberts*, (7 Neb. 4), 20 Am. Rep. 371, and note, 377.

by the court, resulting in a finding and judgment for the plaintiff, a new trial applied for by Allen and Cauthorn having been denied.

Allen and Cauthorn alone appeal, Pritchett having declined to join therein.

The facts in relation to the execution of the bond by the appellants appear to have been as follows:

At the time the bond was signed by Allen, the name of Thomas R. Cobb was written in the body thereof as a co-obligor, and Allen signed it and left it with Pritchett, with the agreement and understanding that it was not to be delivered to the mayor, or used, until it should be signed by Cauthorn and Cobb.

So, when Cauthorn signed the bond, the name of Cobb was written therein as a co-obligor, as above stated; and Cauthorn signed it and left it with Pritchett with the like agreement and understanding that it was not to be delivered until it should be signed by Cobb.

The bond, signed only by Allen and Cauthorn as sureties, was afterward, without their knowledge or consent, delivered by Pritchett to the mayor, with Cobb's name erased, and was approved by him. The mayor had no notice of the condition upon which the appellants had signed the bond, other than the fact that Cobb's name had been written in the body thereof as a co-obligor, and had been erased.

We are of opinion, that upon these facts, the action cannot be maintained, that there has been no valid delivery of the bond, so far as the appellants are concerned, and therefore that it is not their deed.

In the discharge of the duty of approving and accepting the bond, the mayor acted for, and stood in the place of, the obligee; and notice to the mayor of any matter affecting the validity of the bond was as effectual as notice to an obligee when receiving and accepting an instrument on his own behalf. *Covert v. Shirk*, 58 Ind. 264.

If the name of Cobb had not been in the bond as a co-obligor, the facts being otherwise as above stated, the appellants would have been bound by the delivery thus made by Pritchett to the mayor.

Pritchett must be regarded as having been the agent of the appellants for the delivery of the bond, and his delivery would be good, though made contrary to the agreement between him and the

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appellants, and though he transcended his authority in thus making the delivery, if there was nothing on the face of the bond, or otherwise, to indicate that others were to sign it. In such case, the mayor having accepted the bond on the faith of appearances, and without any notice that Pritchett was not authorized to deliver it in its present shape, the appellants would be estopped to question the validity of the delivery thus made. The case of *Dearsdorff v. Foresman*, 24 Ind. 481, may be regarded as a leading case upon this subject, where the authorities are extensively considered. Many cases have followed that above cited, among which may be mentioned *Webb v. Baird*, 27 Ind. 368; *State ex rel. v. Pepper*, 31 id. 76; *Spiller v. James*, 32 id. 202; s. c., 2 Am. Rep. 334; *Wild Cat Branch v. Ball*, 45 Ind. 213; *Hunt v. State ex rel.*, 53 id. 321.

But the law is entirely different, where, as in the cause under consideration, a surety signs the bond which is to be delivered only upon being signed by another whose name appears in the bond as a co-obligor. If delivered without being signed by the other whose name thus appears, without the consent of the one who has signed, the delivery is a nullity, and the latter is not bound. This doctrine is very clearly recognized in the case of *Dearsdorff v. Foresman*, *supra*, and in some of the cases that follow it. We are not aware that in any of them a contrary doctrine is found. In that case the court, in speaking of the case of *Pawling v. United States*, 4 Cr. 219, said: "Here the representative of the government had notice, on the face of the instrument, that the same was not complete, not having been executed by all the parties whose names appeared upon its face as co-obligors. To have held this delivery of the instrument obligatory upon the parties, when the writing itself proved the execution to be incomplete, would have been in contradiction of its express terms."

So also, in speaking of the case of *Fletcher v. Austin*, 11 Vt. 447, the court said: "The case cited from 11 Vermont was where the names of seven sureties appeared upon the face of the bond, and only two of the sureties ever executed the same. The instrument was plainly incomplete until executed by all those whose names appeared as parties."

In that case the court also quoted, with approbation, a note by Judge REDFIELD, which we reproduce, somewhat extended, from

3 Am. Law. Reg. (N. S.) 402, as expressive of our views of the law applicable to the case before us:

"That one who signs a bond, as surety, upon the assurance of his principal that he shall also have other responsible co-sureties which are never procured, and the bond nevertheless delivered, is deceived and defrauded of his indemnity, no one can question. But whether he shall himself bear the loss, or visit it upon the obligee, is quite a different question. And it seems to us, upon principle, that where there is nothing upon the face of the paper, indicating that other co-sureties were expected to become parties to the instrument, and no fact brought to the knowledge of the obligee before he accepts the instrument calculated to put him on his guard in regard to that point, and which would naturally have led a prudent man, interested in the opposite direction, to have made inquiry before accepting the security, the fault cannot be said to rest, to any extent, upon the obligee.

"And on the other hand, where the surety intrusts the bond to the principal obligor in perfect form, with his own name attached as surety, and nothing upon the paper to indicate that any others are expected to sign the instrument, in order to give it full validity against all the parties, he makes such principal his agent, to deliver the same to the obligee, because such is the natural and ordinary course of conducting such transactions. And if the principal, under such circumstances, gives any assurance to the surety, in regard to procuring other co-sureties, or performing any other condition before he delivers the bond, and which he fails to perform, the surety giving confidence to such assurances must stand the hazard of their performance, and cannot implicate the obligee in any responsibility in the matter, unless he is guilty of fraud or rashness in accepting the security.

"It seems to have been held in a majority of the American cases, that in order to put the obligee upon inquiry even, some indication upon the face of the paper, such as the insertion of other names in the body of the bond, or some memorandum attached to the signature of the surety, indicating the condition upon which he signed, should exist, or else some notice *in pais* to the obligee, which might fairly be regarded as equivalent. And that without this the obligee is not chargeable with any positive default; and if there has been default on the part of the obligor, the bond may be enforced."

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In the case of *Sharp v. United States*, 4 Watts, 21, the names of William Laughlin and Alexander Sharp appeared upon the face of the bond as sureties and co-obligors. Sharp had signed the bond, and it had been delivered without the signature of William Laughlin. The court held the bond void as to Sharp, though there was no express understanding that it was not to be delivered without the signature of William Laughlin. The court said, among other things:

"His" (Sharp's) "signature is conditional, and unless it be shown that the condition, viz.: the execution of the bond by William Laughlin, whose name was in the body of it, has been dispensed with by him, he has a good defense to the suit. A man may be willing to bind himself jointly with another, and still unwilling to make himself alone responsible. We cannot agree with the Court of Common Pleas that there is nothing justifying the construction from the face of the bond, in the absence of any other proof, that it is void as to the present defendant."

The above case from Watts goes further than we need to in the case before us, for here it was shown that it was expressly understood, in respect to both the appellants, that the bond was not to be delivered until signed by Cobb. See, also, the case of *Wild Cat Branch v. Ball*, *supra*, as bearing upon this point.

We regard as of no particular importance the fact that the name of Cobb had been erased from the bond at the time it was presented to the mayor for his acceptance. For the purposes of the question involved, the case stands in substantially the same condition as if the name had not been erased. The fact that the name had been placed in the bond was sufficient to indicate to the mayor that it was expected at the time it was placed there, that Cobb would sign the bond. The name having been placed there, and being erased, was quite enough to put a prudent man upon his guard and induce inquiry as to the circumstances of the erasure, and whether the appellants had not signed the bond with the expectation and understanding that it was to be signed by Cobb also before delivery.

The judgment below, as to the appellants, is reversed, with costs, and the cause remanded for a new trial.

Judgment reversed.

FRANKLIN INSURANCE COMPANY OF INDIANAPOLIS v. HUMPHREY.

(65 Ind. 549)

Insurance — wharf-boat — loss by ice — evidence — custom.

Defendant issued a policy to plaintiff "against loss or damage by fire, * * on his wharf-boat, tackle and apparel lying at the wharf of the city of Evansville, Indiana, * * and to receive, discharge and store freight, hazardous, extra-hazardous and specially hazardous," providing "that the loss, if any, shall be adjusted according to the conditions herein contained, and those hereto attached." The conditions were as follows: "Touching the adventures and perils which the said insurance company is contented to bear and take upon itself in this voyage, they are of the seas, lakes, rivers, canals, fires, jettisons, rovers and assailing thieves." *Held*, that the company was liable for the destruction of the boat by floating ice.

In such action evidence of a custom at Evansville of removing such boats to a neighboring ice harbor, for safety during the season of running ice; and of notice by the insurer to the insured, so to remove the property, an offer to accept the risk thereby incurred, and that such removal would have been safe, *held* inadmissible.

ACTION on an insurance policy. The opinion states the facts. The plaintiff had judgment below.

C. A. De Bruler and *E. R. Hatfield*, for appellant.

A. Iglehart, *J. E. Iglehart*, *A. Gilchrist*, and *C. H. Butterfield*, for appellees.

BIDDLE, J. Suit by the appellees, upon an insurance policy alleged to have been made by the appellant to Francis M. Humphrey, for the benefit of his mortgagees, insuring a wharf-boat against loss or damage by fire, and other perils, averring that by a large sheet of ice floating in the Ohio river, the boat was carried away, wrecked, burned and wholly destroyed, without the fault or negligence of the appellees.

A demurrer, alleging the want of facts sufficient to constitute a cause of action, was overruled to the complaint, and exception reserved.

Answer in five paragraphs.

The first paragraph avers, in substance, that long before the loss happened, the Ohio river, in which the wharf-boat was lying, at

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Evansville, became incumbered with floating ice to such an extent that it became dangerous and hazardous to permit the wharf-boat to remain longer where it was, because if the river closed, the breaking up of the ice would almost certainly sink and destroy the boat; that Humphrey, the assured, was the master and owner of the wharf-boat and in the actual control and possession thereof, and that under the circumstances, it became his duty to remove it to a place of safety; that Green river, which empties into the Ohio at a point about eight miles above Evansville, is such a place of safety, being a perfect ice harbor, and is the nearest and most accessible place of safety that could be found, and that on the 18th of December, 1876, the insurance company gave Humphrey a written notice to remove the wharf-boat into Green river, and by its agent frequently requested him verbally to do so, and warned him that the boat would be sunk if permitted to remain longer where she was; and that for ten days after such notice was given, the wharf-boat could have been easily and safely towed to Green river, and moored there, and thenceforth would have been perfectly safe; and if that had been done the loss would not have occurred; that Humphrey carelessly and negligently failed and refused to move the boat until the river became completely frozen over, and that when the ice broke up, on the 16th of January, it was carried by the current in large masses against the wharf-boat, tore her loose and destroyed her; and therefore, that the loss occurred through the gross negligence of the assured (who was master and owner), and the company is not liable.

The second paragraph is the same, except that the refusal of Humphrey to take the boat to Green river is charged to have been fraudulent, the language being as follows:

"But the said Humphrey fraudulently intending and designing that the said wharf-boat should be sunk by the ice, in order that he might recover the insurance money thereon, purposely kept said wharf-boat in said exposed and dangerous locality, well knowing that the same would be sunk when the ice broke up in the Ohio river, and so fraudulently and designedly suffered said wharf-boat to remain at the wharf at Evansville aforesaid, so that when the ice, at the time mentioned in the complaint, to wit, January 16th, 1877, broke up in said Ohio river, it was carried by the current in large masses against said-wharf-boat," etc., "and destroyed it; whereupon defendant says that the loss occurred by the conniv-

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ance, purpose and design of said Humphrey," and that it is not liable.

The third paragraph of the answer is a general denial.

The fourth paragraph avers, precisely as the first and second, the facts in regard to the condition of the river, the danger and hazard of permitting the wharf-boat to remain at Evansville, the practicability of towing her to Green river, and the duty of Humphrey, in the exercise of ordinary care and diligence, to take her there; the safety of Green river ice harbor, the notice by the company to Humphrey, both written and verbal, to take her to Green river, and the warning, that if permitted to remain at Evansville, she would inevitably be destroyed; and that the company also "notified the plaintiffs, that unless they so moved the said wharf-boat, the defendant would not be responsible for the loss thereof, and notified the plaintiffs that the defendant company would take all the risks of loss attending the removal of said wharf-boat to a place of safety;" and it is then alleged that the plaintiffs agreed and promised to take the boat to Green river; that for ten days thereafter, it could easily and safely have been so taken, and that it would then have been safe; but that plaintiffs negligently failed and refused to move it, and so it was destroyed by the ice, when, if their promise to remove it had been kept, the loss would not have happened.

The fifth paragraph of the answer recites a provision of the policy, by which it is made the duty of the assured to labor in and about the safeguard and protection of the said wharf-boat in case of any misfortune happening, and it is then averred, that three days before the wharf-boat was carried down the river, it broke loose from the place where it was moored, and was caught by other parties than the assured, tied to the shore, and possession taken by the assured and watchmen placed in charge; but that the assured, Humphrey, designing that the boat should be lost, negligently and fraudulently failed to fasten the boat to the shore, and although, as Humphrey well knew, it was necessary to fasten it to the bank with more than one line, or with chains, or both, as was usual and customary, he fastened her with only one line, and that an old and rotten one; that the line broke, the watchman abandoned the boat, and so she floated fifty miles down the river, was then caught and tied, and afterward burned, "said Humphrey having in no wise taken any care thereof."

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A reply in several paragraphs was filed to the answer; issues joined; trial by jury; verdict for appellees; judgment on the verdict; and appeal to this court.

By a motion for a new trial, and the demurrer to the complaint, the appellant has presented several questions for our consideration.

1. As to the sufficiency of the complaint :

It is not claimed that the complaint lacks any necessary averment, or that any averment which it contains is insufficient; but it is insisted that the policy declared upon does not cover a loss by the means averred in the complaint; that it insures only against loss or damage by fire, and does not insure against a loss by the perils of the Ohio river.

The language of the policy is as follows :

"By this policy of insurance the Franklin Insurance Company of Indianapolis, Ind., in consideration of the receipt of one hundred dollars, do insure F. M. Humphrey against loss or damage by fire to the amount of two thousand dollars, on his wharf-boat, tackle and apparel lying at the wharf of the city of Evansville, Indiana, privilege \$4,000, total insurance, and to receive, discharge and store freight, hazardous, extra-hazardous and specially hazardous. It is understood that the loss, if any, shall be adjusted according to the conditions herein contained, and those hereto attached."

The conditions attached were as follows :

"Touching the adventures and perils which the said insurance company is contented to bear and take upon itself in this voyage, they are of the seas, lakes, rivers, canals, fires, jettisons, rovers and sailing thieves."

It appears from an averment in the complaint, and by the argument of the appellant, that the parties adopted the form of a fire policy, and that the conditions thereto "attached" were adopted from the form of a marine policy, thus making it really both a fire and marine policy. This doubtless accounts for its apparent incongruity. Upon this ground, the appellant argues that "there are no direct words of insurance against marine perils to be found in the contract;" that "the wharf-boat was not built to make voyages, but to serve as a floating warehouse for the storing of freight;" that "no voyage was contemplated, or in the nature of the case could be made, and hence the 'adventures and perils' enumerated were never in fact assumed by the company." But we are unable to view the policy in that light. The fair construction and plain

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meaning of the policy, when all its parts are taken together, is, that the appellant insured the wharf-boat of the appellee Humphrey "against loss or damage by fire," and against loss or damage by the perils "of the seas, lakes, rivers, canals, jettisons, rovers and assailing thieves." The fact that the wharf-boat was not adapted to navigation, and could not, and was not intended to, make voyages, or enter upon the seas, lakes or canals, but was insured "lying at the wharf of the city of Evansville, Ind.," in the Ohio river, will not vitiate the policy as to the other peril; and the insurance against "jettisons, rovers and assailing thieves," might be as applicable to a wharf-boat as to a boat calculated to make voyages. That the destruction of the boat by the ice, as averred, was by a peril of the Ohio river is not disputed. We think the complaint is sufficient.

2. On the trial, after the appellees had rested, the appellant introduced as a witness John H. Morris, who was duly sworn, and by whom appellant offered to prove the following facts:

"That witness was the owner and master of the tow-boat 'Hotspur,' and had his boat at Evansville when ice began to form and float in the Ohio in December, 1876; that Green river empties into the Ohio eight miles above Evansville, and is a perfect ice harbor and peculiarly adapted to the safety of boats threatened by the ice, and the only ice harbor on the Ohio within reach; that this fact was well known and universally understood among all river men, and that it is, and was in December, 1876, and has been from time immemorial, the well-understood, universal and perfectly well-known custom among all river men, owners and masters of wharf-boats, etc., to take all such boats and wharf-boats to the mouth of Green river upon the approach of danger from floating ice in the Ohio river, and that such custom and usage was in full force on the 4th day of November, 1876, and was well known to all river men and all business men generally in the city of Evansville; that at any time in the month of December, 1876, up to the 25th, Humphrey's wharf-boat — the subject of the insurance in this action — could easily have been towed and taken by the said tow-boat 'Hotspur' to Green river; that said 'Hotspur' was, during the month of December, 1876, at various times up to the 25th, engaged in towing various crafts to the mouth of Green river from the wharf at Evansville, and on Sunday, December 18th, 1876, did so tow a large wharf-boat owned by Rankin & Co., and a few days

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thereafter another large wharf-boat, and that Humphrey's boat, the one in controversy, would not have been much harder to tow than either of those; that said Humphrey did procure another wharf-boat, owned by him, to be towed to Green river in December, 1876, about the middle of the month; that ice began to form in the Ohio about December 8th, 1876, and that at many times thereafter the river was clear of ice between Evansville and Green river, before the loss complained of happened; that witness has been engaged in river business, in various capacities, for the past ten years."

This testimony was objected to by the appellees, and excluded by the court, to which appellant excepted.

The facts above stated and offered to be proved lack some of the essential requisites necessary to the validity of a particular custom at common law, as that it was continued without interruption, was peaceable and acquiesced in, and was compulsory and binding upon all, and lack an additional and important requisite to make it binding in this State, namely, that it was coextensive with the State. Perhaps it is not within the constitutional power of the legislature in this State to make such a particular and local custom binding save by express statute; much less, then, could it be upheld by the common law. *Franklin Life Ins. Co. v. Sifton*, 53 Ind. 380; *Spears v. Ward*, 48 id. 541. But the most palpable objection to the evidence offered is that it would tend to contradict the written terms of the policy which insured the wharf-boat "lying at the wharf in the city of Evansville, Ind.," and did not insure it lying in the mouth of Green river, Kentucky, nor on its passage from where it was insured to and from the mouth of Green river. It is not contemplated that a wharf-boat, which is a floating dock and warehouse combined, for the purpose of receiving, storing and shipping goods, is to be removed from the waters in which it is built, and the place to which it is adapted. The owner is entitled to the use of his wharf-boat at the place where it is designed to remain, as well in the winter time, if he then can and desires to use it, as he is during the boating season; and it might be that a removal of the wharf-boat, as contemplated by the facts offered to be proved, if made without the consent of the insurer, would have been such a deviation from the proper use of the boat, as to avoid the policy, if it had been lost at any other point than that at which it was insured, and where it was designed to remain.

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The appellant has offered much argument, and cited many authorities, to show us, that, where the loss of insured property is caused by the wrongful act of the insured party, he cannot recover on the policy. We are not differing from the appellant in this view, but the facts offered to be proved in this case do not tend to show a wrongful act on the part of the appellees, nor even negligence. Wood on Ins. 108, 221, and authorities there cited; May on Ins. 493, 499; *Copeland v. New England Marine Ins. Co.*, 2 Metc. 432; *City Fire Ins. Co. of N. Y. v. Corties*, 21 Wend. 367; *Dixon v. Sadtler*, 5 M. & W. 405; *Leeds v. Mechanics' Ins. Co.*, 8 N. Y. 351; *Equitable Ins. Co. v. Hearne*, 20 Wall. 494; *Ins. Co. v. Wilkinson*, 13 id. 222; *Cincinnati Mutual Ins. Co. v. May*, 20 Ohio, 211; *Hill v. Portland & Rochester R. R. Co.*, 55 Me. 438; *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174; s. c., 14 Am. Rep. 494; *Luce v. Dorchester Ins. Co.*, 105 Mass. 297; s. c., 7 Am. Rep. 522; *Dudgeon v. Pembroke*, 10 Eng. R. (Moak's Notes) 192; *Gove v. Farmers' Mutual Fire Ins. Co.*, 48 N. H. 41; s. c., 2 Am. Rep. 168; *Huckins v. People's Mutual Fire Ins. Co.*, 11 Fost. 238; *Howland v. Marine Ins. Co.*, 2 Cr. C. C. 474; *Hazard's Adm'r v. New England Marine Ins. Co.*, 8 Pet. 557.

3. The appellant then offered to read to the jury the following statement of an absent witness, John B. Hall, embodied in an affidavit for a continuance, filed by the appellant, and which statement the plaintiffs, before going into the trial, had agreed and admitted in open court, the said witness, John B. Hall, would testify to if he were present, to wit: "That the wharf-boat which is the subject-matter of the insurance herein, and for the recovery of the amount insured on which this action is brought, could, without risk or danger of the same being destroyed, have been towed to Green river, which was a place of safety, eight miles or thereabouts distant from the city of Evansville, at any time after the ice first made its appearance in the Ohio river, in December, 1876, until the 30th of said month; that tow-boats of sufficient power were at the port of the city of Evansville, and their services could have been procured to have towed said wharf-boat of plaintiffs to Green river, during the time aforesaid; that the weather during said time was calm, and there was no reason to apprehend disaster from wind, and that the stage of water in the Ohio river, between Evansville and Green river aforesaid, was sufficient for the said boat to be so towed to said place of safety; that all other wharf-boats and steamboats of any

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considerable size, which had been lying at the wharf at Evansville, had been removed during the time aforesaid to a place of safety; that, from the time ice first appeared in said month of December, 1876, in the Ohio river, it was apparent to all men who had knowledge of the river and its dangers, that there was great danger to be apprehended in leaving a wharf-boat at the wharf at Evansville; that the plaintiff, Francis M. Humphrey, was personally in charge of said wharf-boat, and had full and complete control of the same, and that it was his duty, in the exercise of ordinary care and prudence, for the purpose of preventing injury to said wharf-boat, to have removed the same, during the time aforesaid, to a place of safety.

This evidence, also, was excluded by the court, upon objection of appellees, and appellant excepted.

This proposition, in principle, is the same as the second, which we have fully considered. It is not necessary, therefore, to examine the question further. The next proposition made by the appellant is also the same, and need not be stated nor considered.

4. Appellant then offered to prove by Frank L. Whicher, a competent witness, that said Whicher was the agent of appellant at Evansville, in December, 1876, and as such agent, on the 18th of that month, served on the appellees the written notice mentioned in the pleadings, and frequently from the 18th to the 30th of said month, notified Humphrey to move the wharf-boat to Green river, and offered that such removal might be made at the risk of the insurance company; and also offered to read to the jury the written notice served by Whicher, its agent, on Humphrey, on the 18th of December, requesting him to take his boat to Green river, and warning him of imminent danger from the ice; and also offered to prove by John C. Shoemaker, president of the Franklin Insurance Company, that the company, at the time, ratified and approved of the act of its agent, Whicher, in notifying appellees to move the wharf-boat; but upon objections by appellees, the court excluded the evidence, and appellant excepted.

We have seen that there was no valid particular custom, requiring Humphrey to move his wharf-boat to the mouth of Green river, and there is no general law requiring him to do so. There is no stipulation in the policy binding him to do so, and he was not bound to do so upon the notification of the appellant, and he was not bound to accept new terms of insurance, varying the policy, al-

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though offered by the company. The wharf-boat was built at the wharf at the city of Evansville, to be used at that place; it was not adapted to be removed to the mouth of Green river, although it might have been practicable to take it there; and at that place it might have been, and probably would be, useless to the owner while it remained. We think the owner had a right to have his boat remain in the waters where it was built, and to use it at that place for the purposes to which it was adapted. The policy insured the boat against the perils of the river at that place, and not against the lesser perils that might overtake it in the mouth of Green river.

5. The appellant discusses the question of fraud set up in the second paragraph of answer, and insists that although the facts offered to be proved might not amount to any thing more than negligence which would not prevent Humphrey from recovering on the policy, yet when a fraudulent purpose and corrupt design entered into his conduct by which he desired that the boat should be lost, "in order that the insurance money might be recovered," they amount to fraud which will prevent him from recovering on the policy; but if Humphrey, as we have held, had a right to keep his boat at the wharf in the city of Evansville, his motive, intention or purpose in doing so could not vitiate his acts. Fraud cannot be predicated upon acts which the party charged has a right by law to do, nor upon the non-performance of acts which by law he is not bound to do, whatever may be his motive, design or purpose, either in doing or not doing the acts complained of.

It seems to us that the questions in this case have been thoroughly discussed that the case has been well tried, and that the judgment is in accordance with the law and the facts. It is therefore affirmed, at the costs of the appellant.

Judgment affirmed.

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(65 Ind. 582.)

Statute — construction — intercalary day in leap-year.

The statute of 21 Henry III, concerning leap-year, makes no provision as to how the 28th and 29th of February shall be counted in computing a number of days less than a year; the 29th of February is an independent day.

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such computations ; and so service of a summons on the 25th of February, for a term commencing March 6th. is a valid ten days' notice. (*See note, p. 92.*)

ACTION to set aside a judgment. The opinion states the case. The defendant had judgment below.

W. Armstrong, J. T. Dye and A. C. Harris, for appellant.

F. W. Vishe and R. G. Evans, for appellees.

Howk, J. In this action the appellant, as plaintiff, sued the appellees, as defendants, in a complaint of a single paragraph. To this complaint, the appellee, the Vincennes National Bank, separately demurred upon the following grounds of objection :

1. That the complaint did not state facts sufficient to constitute a cause of action ;
2. For a defect of parties plaintiffs, in this, that the appellees John J. McLaughlin and Howard A. Trendley ought to have been, but were not, parties plaintiffs.

The appellees McLaughlin and Trendley demurred to appellant's complaint, for the alleged insufficiency of the facts therein to constitute a cause of action.

These demurrers were severally overruled by the court, and to these decisions the appellees severally excepted.

The appellees jointly answered, in two paragraphs, of which the first was a general denial, and the second paragraph was a special or affirmative defense. To the second paragraph of the answer, the appellant demurred, for the want of sufficient facts therein to constitute a defense to his action, which demurrer was overruled, and to this ruling he excepted. He refused to reply to the second paragraph of the answer, and for the want of such reply, the court rendered judgment in favor of the appellees and against the appellant, for the costs of this suit, from which judgment this appeal is now here prosecuted.

The appellant has assigned, as error, the decision of the Circuit Court in overruling his demurrer to the second paragraph of the appellee's answer, and the appellee, the Vincennes National Bank, has assigned, as a cross error, the overruling of its demurrer to the appellant's complaint.

The object of this action was to have the court set aside, and declare null and void, a certain judgment rendered in and by said

court, on the 7th day of March, 1876, in favor of the appellee, the Vincennes National Bank, and against the appellant and the appellees, McLaughlin and Trendley. In his complaint in this action the appellant alleged, in substance, that on the 24th day of February, 1876, the appellee, the Vincennes National Bank, filed a complaint against the appellant and said McLaughlin and Trendley, in the clerk's office of the said Daviess Circuit Court, demanding judgment therein for \$6,000, on a promissory note executed by the appellant and said McLaughlin and Trendley, to said Vincennes National Bank; that on said last-named day, the clerk of said court issued the only summons issued in said cause, to the sheriff of Daviess county, Indiana, commanding him to summon the appellant, and said McLaughlin and Trendley, to answer the complaint of said Vincennes National Bank, on the second day of the next term of said court, to be begun and held in said county on the first Monday of March, 1876, being the 6th day of March, 1876; that the said summons was placed in the hands of said sheriff, on the day of its issue, who duly served the same on the 25th day of February, 1876, on the appellant and said McLaughlin and Trendley, and made return of such service on said summons; that on the second day of the said March term of said court, being the 7th day of March, 1876, on the call of said cause, the Vincennes National Bank, by its attorney, produced and read the said summons and return to the court, and relying solely upon said summons and return, the court caused the appellant and McLaughlin and Trendley to be called, and upon their failure to appear or answer, to be defaulted; that relying solely on said summons, and the said service thereof, as being more than ten days before the first day of said term and the said default entered thereon, the court rendered judgment thereon against the appellant and said McLaughlin and Trendley, in favor of the appellee, the Vincennes National Bank, in said cause, for \$5,075; that in truth and in fact, the said summons, so issued in said cause, was not served on the appellant and said McLaughlin and Trendley, ten days before the first day of the March term, 1876, of said court, but was in fact, as was shown by the return of said summons, served on said parties only nine days before the first day of said term, which summons was the only summons issued or served on said parties, and the only notice given them of the pendency of said cause; that the said default and judgment in said cause were illegal and void; that said judg-

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ment was a cloud and an apparent lien on and against the appellant's property, and that the appellees McLaughlin and Trendley were made parties defendants to this action to answer as to any interest they might have in said judgment, and to protect any interest or right they might have therein. Wherefore, etc.

This cause has been submitted to this court for decision, upon a written agreement of the parties, signed by their counsel, as follows:

"We agree that this cause shall be at once submitted to the Supreme Court, and only two questions shall be presented or argued, viz:

"1st. Is the service sufficient?"

"2d. Is the judgment void, so as not to be cured by a release of errors and waiver of all irregularities?"

These two questions we will consider and decide, in the same order in which counsel have presented and discussed them.

1. From the allegations of the appellant's complaint, the substance of which we have already given, it will be seen that the legality and validity of the service of the summons therein mentioned are not called in question. But the question for decision may be thus stated: Under the facts stated in the complaint, had the service of the summons been made ten days before the first day of the term of the court at which the appellant and his co-defendants were defaulted, and the judgment against them was rendered? It is provided in and by section 315 of the Practice Act, as follows:

"SEC. 315. Every action shall stand for issue and trial at the first term after it is commenced, when the summons has been served on the defendant ten days, or publication has been made for thirty days before the first day of the term." 2 R. S. 1876, p. 162.

Therefore, unless the facts stated in the complaint showed that the service of the summons therein mentioned was made ten days before the first day of the March term, 1876, of the Circuit Court, it is clear, we think, that the default and judgment mentioned in the complaint were improvidently and irregularly, at least, entered and rendered. The service of the summons set forth in the complaint was made ten days before the first day of the said March term, if the intervening 29th day of February, 1876, which was the bi-sexile or leap-year, can be legally counted as one separate and distinct day. If, however, the 28th and 29th days of February, of

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the leap-year, constitute, under the law of this State, only one day, then it would follow that only nine legal days intervened between the service of the summons and the first day of the said March term, 1876, of the court below.

[Omitting a history of local statutory changes.]

We think it is certain, therefore, that, if the 28th and 29th days of February, in every leap-year, must be considered in law as one day, it is not now by reason of any statutory provision to that effect in this State.

There are, however, some decisions of this court, to the effect that the 28th and 29th days of February in every leap-year must be accounted as but one day. The first case in this court, in which this question was mooted and commented upon, was the case of *Swift v. Tousey*, 5 Ind. 196. It was not necessary, perhaps, to the decision of that case or to the conclusion arrived at therein, that the court should have determined, or attempted to determine, the question as to whether the 28th and 29th days of February in leap-year must be considered in law as two days, or as only one day; but in the opinion of the court, the two days were apparently regarded in legal contemplation as but one day. Upon this point, the opinion of the court was founded upon the English statute of 21 Henry III. It was said by the court: "This ancient statute, being prior to 4 James I, made in aid of the common law, and not inconsistent with our institutions, would seem to be in force in this State." This may be conceded, but it seems to us that the statute in question can have no possible bearing on the proper decision of the question now under consideration. The preamble of this statute shows that it was enacted for certain purposes, and to remove doubts in relation thereto, which are unknown to the law of this State. In the English version of this ancient statute, it reads as follows:

"The King unto his Justices of the Bench, Greeting: Know ye, that where within our Realm of England, it was doubted of the year and day that were wont to be assigned unto sick persons being impleaded, when and from what day in the year going before unto another day of the year following, the year and day in leap-year ought to be taken and reckoned how long it was:

"II. We therefore, willing that a conformity be observed in this behalf every where within our Realm, and to avoid all danger from such as be in plea, have provided, and by the counsel of our faith-

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ful subjects have ordained, That to take away from henceforth all doubt and ambiguity that might arise hereupon, the day increasing the leap-year shall be accounted for one year, so that because of that day none shall be prejudiced that is impleaded, but shall be taken and reckoned of the same month wherein it groweth ; and that day, and the day next going before, shall be accounted for one day. And therefore we do command you, that from henceforth you do cause this to be published afore you, and be observed. Witness myself at Westminster," etc.

It will be seen, we think, from this statute, which we have set out in full, that it simply provides that the 28th and 29th days of February, as parts of a year which, at common law, consisted of three hundred and sixty-five days, should be accounted for one day, in computing "the year and day that were wont to be assigned unto sick persons being impleaded." The statute makes no provision as to how the two days should be accounted, in computing a number of days, less than one year, in which they might occur ; and therefore it seems to us, that the English statute, conceding it to be in force in this State whenever applicable, is not decisive of the question we are now considering.

By the first rule in section 1 of "An act in relation to the construction of statutes, and the definition of terms," approved June 18th, 1852, it is provided, that "Words and phrases shall be taken in their plain, or ordinary, and usual sense. But technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." 2 R. S. 1876, p. 315.

The phrase "ten days," as used in section 315, above quoted, of the Practice Act, has no peculiar or technical meaning in law. A day, in its legal as well as in its "plain, or ordinary, and usual sense," means a period of time consisting of twenty-four hours, and including the solar day and the night. Co. Litt. 135, a ; Bracton (folio), 264.

Each of the 28th and 29th days of February, in the leap-year, is a day of twenty-four hours' duration ; and where these two days occur in any period of days less than one year, we are clearly of the opinion, that under the law of this State, they ought to be and must be regarded and computed as two days, and not as one day, for any purpose.

The case of *Swift v. Tousey*, *supra*, and the cases which follow

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it, of *Craft v. State Bank of Indiana*, 7 Ind. 219; *Kohler v. Montgomery*, 17 id. 220, and *Porter v. Holloway*, 43 id. 35, in so far as they are in conflict with the conclusion reached in this case, are overruled.

From what we have said, it follows necessarily that the service of the summons mentioned in the appellant's complaint was made ten days before the first day of the March term, 1876, of the court below, and was sufficient.

The judgment is affirmed, at the appellees' costs.

Judgment affirmed.

NOTE BY THE REPORTER.—The New York statute (1 R. S. 606, § 3) provides that "whenever the term 'year' or 'years' is or shall be used in any statute, deed, verbal or written contract, or any public or private instrument whatever, the year intended shall be taken to consist of three hundred and sixty-five days; a half year of one hundred and eighty-two days; and a quarter of a year ninety-one days; and the added day of a leap-year, and the day immediately preceding, if they shall occur in any period so to be computed, shall be reckoned together as one day." In speaking of this statute, the *Albany Law Journal* (vol. 21, p. 61) remarks:

"It would therefore seem that this statute, considered by itself, cannot apply to any sort of commercial paper. Whatever its intent, our revisers took it into account in the revision of our statutes, for they say, in a note on our statute in question: 'The third section of this title is founded partly on the common law as recognized by our courts, and partly on the statute of 21 Henry III, which was included in the general repeal of British statutes, and has never been re-enacted in this State; but as its provisions are necessary to the perfection of the rule, it has been deemed expedient to incorporate them in the proposed section.' It would seem then that there was nothing in the original statute nor in the adoption of it into our law, to furnish any reason for the application of it to commercial paper payable in a given number of months or days. It would also seem that the Indiana decisions respecting commercial paper and founded on the statute of Henry III, are erroneous."

In *Commercial Bank of Kentucky v. Varnum*, 43 N. Y. 239, it was held that a statute abolishing days of grace on commercial paper payable, on its face, on a specified day, or in any number of days, or at sight after date, does not include paper payable on its face in months or years.

A correspondent of the *Albany Law Journal* (vol. 21, p. 139) says of leap-year:

"The Gregorian was but the correction of an error of an intercalation by the Julian or old style. Writers defining those styles speak of years and months varied in the number of their days in the attempt to keep the year coincident with the seasons. Julius Cæsar decreed the beginning of the year with January, its division into twelve months, the odd months to have thirty-one days, the even thirty, except February in ordinary years, which was then given twenty-nine. Every year a day was to be intercalated between the twenty-fourth and fifth days of that month. The twenty-fifth was the *sexta calendas*. The added day, preceding it in time, but by the Roman method of reckoning back from a future day the calends of March, following it in computation, was called *bis-sexta calendas*. By this way of numbering, the days between the *idus* of February and the intercalated day retained their ordinary numbers. Was this *bis* day another, or it and the next a double day? The fact that the next day retained its name in leap-year of *sexta* would seem to indicate that they were counted as two days, while its name *intercalar* would indicate either a wedging or suppressing of it between the two days between which it was placed and which retain their relative numbers. The manner in which it was spoken of gives little aid in determining what was its value. It is said that 'in the ecclesiastical calendar the intercalary day is still placed between the 24th and 25th of February; in the civil calendar it is the 29th.' Enc. Brit., title Calendar, vol. VI, p. 77, 8th ed. Is the 'Gregorian' of the

Helphenstine v. Vincennes National Bank.

Revised Statutes the ecclesiastical or the civil calendar? Whatever the significance of the term 'intercalar,' our Revised Statutes calling it an 'added' day, and our practice dignifying it with a local habitation (99th) and a name (Sunday) would seem to be a recognition of its having an existence as a day and the value thereof. Even in the ecclesiastical calendar it has a place in the week and leap-year has two dominical letters. This whole science of calendar making is a tentative one. The unit of measurement of time must continue to be the one most appreciable to the senses — the solar day — from sun to sun. But promises to perform will be made dependent on those larger measures — the earth and moon in their courses. The law recognizing the contract and its exactness, merely says it shall be executed while the day lasteth; upon the day nearest the contract time. It cannot make the day a mean divisor of these larger measures; but it provides that they, the month and year, *as known to the law*, shall vary in the number of their days. So Sosigenes devised and Julius decreed that February should at times cover twenty-nine and at times thirty days. The theory of that style tested by the actual fact revealed an error of some three-fourths of a day in a century.

Gregory corrected the accumulated errors of several centuries and put in force a new style by which the error is reduced to a day in thirty centuries. The month varies, the day is unchanged.

The law enforces contracts as nearly as practicable according to their terms, interposing its arbitrariness for the sake of uniformity in administration. It therefore provides that a half year shall be taken to mean 183 days, and a month a calendar month 1 R. S. 606, §§ 3, 4. It also provides that interest, at a yearly rate, shall be computed for a less time than a year at as many twelfths of the yearly rate and as many thirtieths of one-twelfth of the yearly rate as the time covers of calendar months and excess over of days. 1 R. S. 773, § 9. From February 20th, 1879, to March 10th was eighteen days to be called 18-30 of 1-12 of a year in computing interest under the statute. Suppose a note due February 20, 1880, be recovered upon in justices' court on March 10th, this year; is there any question but what under this statute 12-30 of the 1-12 of a year's interest must be allowed? Is not the time actually longer by a day, an "added" day to February?

The question does not seem to have been adjudicated in this State, but as affecting commercial paper several text-writers have considered it. Story says: (Rom. notes, § 213 a), 'Suppose a note dated on the 28th, 29th, 30th or 31st day of January, payable in one month, on what day will it become due? The true answer will be on the 28th of February, if the year is not bissextile, and if it be, then on the 29th day of February, and grace is to be calculated thereon from and after the 28th or 29th day of February accordingly.' Daniels (Negotiable Instruments, § 624): * * * 'A month dating from the 31st of January would expire on the 28th or 29th of February, as the case might be; and in leap-year, a month counting from the 31st, 30th or 29th of January would end on the 28th of February; and the last day of grace would be March 3d. But if a bill or note were dated January 23th, a month therefrom would terminate on February 28th, and presentment should be on *March the second*' (citing *Wagner v. Kenner*, 2 Rob. [La.] 120) Parsons, to the same effect as Daniels (1 Pars. N. & D. 409). Days of grace are by imputation of law time contracted for as "days." If the 29th of February, as Story, Daniels and Parsons regard it, is a day of grace, may it not also be a *dies true*?

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY CO. v.
RICHARDSON.

(63 Ind. 43.)

Negligence — communication of fire — contributory negligence.

In an action against a railway company, by the owner of real estate adjoining the track, for the burning of his house by sparks from a locomotive, it being found that the fire was communicated by reason of a defective spark arrester, *held*, that the plaintiff might recover, although the sparks entered the house through an open window in an unoccupied room, the plaintiff not being aware of the defect in the locomotive. (*See note, p. 98.*)

ACTION for damages by a conflagration. The opinion states the facts. The plaintiff had judgment below.

T. J. Jackson, for appellant.

G. Putnam, G. W. Friedly, W. H. Edwards, J. W. Buskirk and H. C. Duncan, for appellee.

PERKINS, J. Suit by the appellee against the appellant, to recover damages she sustained by the burning of her house and some personal property, through the negligence of the appellant in running its locomotive along and upon its railroad tracks, using at the time imperfect, improper and inefficient spark-arresters in and over the smoke-stack of said locomotive, etc.

The paragraphs of complaint were sufficient. They severally sufficiently charged the negligence of the appellant, the injury done, and alleged that it happened without the fault of the appellee, etc. *Clark v. Jeffersonville, etc., R. R. Co.*, 44 Ind. 243; *Terre Haute, etc., R. R. Co. v. Graham*, 46 id. 239; *City of Fort Wayne v. DeWitt*, 47 id. 391.

Answer, the general denial. Trial by jury. Verdict as follows: "We, the jury, find for the plaintiff, and assess her damages at \$3,000 — three thousand dollars." The jury also returned answers to the following interrogatories, as follows:

"1st. Are you satisfied, by a preponderance of the evidence, that the house of the plaintiff was set on fire by defendant's loco-

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motive known as the 'Tornado'? A. Yes. 2. Has it been proved to your satisfaction, and by a preponderance of the evidence, that said locomotive was not in a good condition, and its smoke-stack not properly guarded? A. Yes. 3. Is it proved that the defendant did not, at the time of the fire, use a suitable device for the arrest of sparks from the smoke-stack of her said engine? A. Yes. 4. Did the fire that burned plaintiff's house originate in the upper story, and in a room where one or more windows were left open on the end of the house next to the railroad, and while said locomotive was passing and repassing on defendant's road? A. Yes. 5. Was there bedding in said room, and a bed or lounge immediately under a window, which window was left open by plaintiff at said time when the fire caught, and when defendant's locomotive was passing and switching? A. Yes. 6. Was said room occupied at the time? A. No. 7. Did the fact that the window was left open, at the time of the passing and switching of said engine, contribute to the injury complained of? A. Yes, but no negligence on the part of the plaintiff. 8. How much of your verdict for damages, if any, for the loss of the 'Putnam House,' so-called? How much for personal property, if any? How much for stable, if any? How much for any other property, if any? A. We only find \$2,000 for 'Putnam House,' and \$1,000 for personal property therein, and nothing for any other property. 9. Was the stable, wash and meat house, coal house, fences and walks of the plaintiff, or either of them, destroyed by the fire, by being fired directly from the sparks of the defendant's engine, or only by having caught from the main or Putnam House? A. Yes, all of them; we find that the property mentioned in this last interrogatory was burned, but not directly from the sparks of the defendant's engine, but from taking fire from the Putnam House."

After the verdict was returned, the appellant moved the court to render judgment in favor of the defendant upon the special findings of the jury, and assigned several reasons in support of this motion, but the court overruled the motion, and rendered judgment on the general verdict, to which the appellant excepted.

On appeal to this court, it is assigned for error: 1. That the court refused the motion to strike out parts and all of the paragraphs of the complaint; 2. To make the second paragraph of complaint more specific; 3. That the court overruled the several demurrers to the paragraphs of complaint; 4. That the court

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overruled the motion for judgment on the special findings ; 5. That the court overruled the motion for a new trial; 6. That the court overruled the motion in arrest.

The court committed no error in overruling motions touching, and demurrers to, the paragraphs of complaint.

The court committed no error in overruling the motion for judgment on the special findings, as they were not irreconcilably inconsistent with the general verdict; and the rule is that the "antagonism between them must be apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issues, before the court can be called upon to give judgment against the party who has the general verdict in his favor."

The sparks or coals of fire by which the Putnam House was set on fire issued from the smoke-stack of the locomotive named the "Tornado."

This testimony was before the jury as to the condition of that smoke-stack :

"The smoke-stack was one of the oldest on the road. The netting was all cut away and rotted away round the rim, and holes punched in it. The smoke-stack was not fit for any thing ; it was taken down and thrown away," not long after the fire. The netting spoken of was made of wire ; and the netting is to prevent the throwing off or emission of sparks of fire. On the day the Putnam House was burned, the "Tornado" passed within forty or fifty feet of the house ; the day was windy, and one witness testified that sparks issued from the smoke-stack of said locomotive as big as his little finger, and another that he saw some as large as his thumb. The testimony tended to show that a smoke-stack, provided with good netting, would not emit dangerous sparks. There was no evidence that the appellee had knowledge of the condition of the smoke-stack of the "Tornado," nor that the engine was to be run on the road on the day of the fire, nor that it was to stop, or was stopping, for any length of time, in front of her said property.

Turning now to the answers to interrogatories :

The answer of the jury to the seventh interrogatory was, that "the fact that the windows were left open at the time of the passing and switching of said engine contributed to the injury complained of," but that there was "no negligence on the part of the plaintiff," appellee ; that is, that the windows being open contrib-

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uted to or facilitated the injury, but that the leaving open of said windows did not constitute contributory negligence, and hence did not bar the right of recovery of the appellee. To illustrate. The idea is this : If the windows had been shut, and the road had shot fire-balls through them, thereby causing the burning of the house, the fact that the glass in the windows was not of sufficient strength to resist the fire-balls would have contributed, in a sense, to the firing of the house. Or if the sparks, as big as a man's thumb, had been driven against and through the windows when closed, the same would have been the fact. But contributions to the injury do not necessarily preclude the right to recover compensation for it. The contribution must be negligent. It is contributory negligence that bars the right of action for compensation.

We state, as a correct proposition of law, that it was not negligence in the appellee to leave her windows open, if the passing of locomotives or engines, with properly constructed, and at the time, properly guarded smoke-stacks, would not endanger her property, unless she had knowledge or notice of the coming of such as were dangerous. She would have a right to act upon the presumption that the company would do its duty, and run only engines with safe smoke-stacks. It is plain from the evidence that her property was not in danger from engines having properly constructed smoke-stacks, in proper condition, and that the appellee had no notice or knowledge of the approach of the "Tornado." Hence the jury were well justified in finding that there was no negligence on the part of the appellee, a proposition which was involved in the general verdict.

We proceed to the question whether the court erred in overruling the motion for a new trial.

The verdict rendered was not contrary to law, and was sustained by evidence.

It was claimed in the motion that the court committed errors of law upon the trial :

1. In giving the latter part of instruction numbered fifteen, which was in these words, viz: "Also, I leave it to you as a question of fact, whether there was negligence in the plaintiff, that invited or contributed to the injury complained of."

It is said in the elaborate case of *Gagg v. Vetter*, 41 Ind. 223: "The question of negligence is one of mingled law and fact, to be decided as a question of law by the court, when facts are undisputed or conclusively proved, but not to be withdrawn

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from the jury when the facts are disputed and the evidence is conflicting."

According to this rule the question of negligence in this case was correctly left to the jury, under proper instructions which had already been given in the cause to the jury.

[Omitting minor matters. For an error in excluding evidence.]

The judgment is reversed, with costs, and the cause remanded for a new trial.

Judgment reversed.

NOTE BY THE REPORTER.—The cases illustrating the doctrine of contributory negligence in actions for negligent communication of fire have been collected by Mr. Thompson in his excellent recent work on Negligence. The leading case is *Vaughan v. Taff Vale Ry. Co.*, 3 H. & N. 742; 5 id. 678.

1. WHAT IS NOT CONTRIBUTORY NEGLIGENCE.—Allowing grass and other combustible matter to grow on the land. *Vaughan v. Taff Vale Ry. Co.*, *supra*; *Flynn v. San Francisco & San Jose R. R. Co.*, 40 Cal. 14; s. c., 6 Am. Rep. 596, and note, 597; *Kellogg v. Chicago & N. W. Ry. Co.*, 26 Wis. 223; s. c., 7 Am. Rep. 69; *Smith v. Hannibal, etc., R. Co.*, 37 Mo. 287; *Fuch v. Pacific R. Co.*, 45 id. 322; *Erd v. Chicago, etc., R. Co.*, 41 Wis. 66; *Snyder v. Pittsburgh, etc., R. Co.*, 11 W. Va. 15. Leaving open the doors of an unfinished building in which were shavings. *Fero v. Buffalo, etc., R. Co.*, 23 N. Y. 209. Allowing the roof of a barn to be covered with old and dry or decayed shingles. *Phil. etc., R. Co. v. Hendrickson*, 80 Penn. St. 183; s. c., 21 Am. Rep. 97; *Jefferts v. Phil. etc., R. Co.*, 3 Houst. 447. Allowing leaves and other combustible matter to accumulate on the land. *Salmon v. Delaware, etc., R. Co.*, 38 N. J. L. 5; 39 id. 299; 20 Am. Rep. 356. Building a house within thirty rods of the railway. *Burke v. Louisville, etc., R. Co.*, 7 Helsk. 451; s. c., 19 Am. Rep. 618. To stack new-mown hay thirty rods from the track. *St. Joseph, etc., R. Co. v. Chase*, 11 Kans. 47. To plough a trench around a hedge and straw ricks. *Burlington, etc., R. Co. v. Westover*, 4 Neb. 268. Failing to remove a bar standing dangerously near the track. *Haswell v. Chicago, etc., R. Co.*, 43 Wis. 196. Suffering a pane of glass to be out of a window. *Martin v. Western, etc., R. Co.*, 33 Wis. 437. Leaving a large door open in a mill. *Rowell v. Railroad*, 51 N. H. 132; s. c., 24 Am. Rep. 59. Leaving a shed door open and shavings within the shed, and old and dry shingles on the roof. *Ross v. Boston, etc., R. Co.*, 6 Allen, 87.

2. WHAT IS CONTRIBUTORY NEGLIGENCE.—To allow the windows of a warehouse to remain open and unglazed, in which were stored cobs, husks, grain, rags, etc. *Great Western Ry. Co. v. Haworth*, 39 Ill. 347. To allow dry grass and weeds to grow on the land. *Chicago & N. W. R. Co. v. Simonson*, 54 Ill. 514; s. c., 5 Am. Rep. 155. To allow shavings to accumulate around an unfinished house one hundred feet from the track. *Coates v. Missouri, etc., R. Co.*, 61 Mo. 38. Building a house very near defendant's wood yard. *Macon, etc., R. Co. v. McConnell*, 27 Ga. 481. Allowing straw and manure to accumulate from a barn two feet from the line fence, in the summer. *Collins v. N. Y., etc., R. Co.*, 5 Hun, 499. Allowing an accumulation of hay and shavings between buildings, and under one raised on blocks two and a half feet high, and open next the railway. *Murphy v. Chicago, etc., Ry. Co.*, 45 Wis. 222; s. c., 30 Am. Rep. 721. Not plowing around stacks in an open prairie. *Keese v. Chicago, etc., R. Co.*, 30 Iowa, 78; s. c., 13 Am. Rep. 643. See 1 Thompson on Neg. 165.

GUETIG V. STATE.

(66 Ind. 94.)

Criminal law — opinions of jurors — evidence — insanity — frenzy — burden of proof — medical opinions.

Under a statute of Indiana, jurors who have read the evidence on a former trial of the same indictment as reported in newspapers, and formed and expressed opinions, derived therefrom, on the merits of the case, which it would require evidence to remove, but which would readily yield to evidence, are competent. (*See note, p. 108.*)

On the trial of an indictment for murder, the court instructed the jury that "frenzy arising solely from the passions of anger and jealousy, no matter how furious, is not insanity." *Held, correct.*

On the trial of an indictment, where insanity was relied on as a defense, the court instructed the jury that "the law presumes that a man is of sound mind until there is some evidence to the contrary. * * * An accused is entitled to an acquittal if the evidence engenders a reasonable doubt as to the mental capacity at the time the alleged offense is charged to have been committed. Evidence * * tending to rebut the presumption of sanity need not, to entitle the defendant to an acquittal, preponderate in favor of the accused. It will be sufficient if it raises in your minds a reasonable doubt." *Held, correct.*

An instruction that while the jury should consider the opinions of medical experts in connection with all the other evidence, they were not bound to act thereon to the entire exclusion of other testimony, but should determine the question of sanity from all the evidence; and that such an opinion "based upon a hypothesis" which is "wholly incorrectly assumed, or incorrect in its material facts to such an extent as to impair the value of the opinion, is of little or no weight;" *held, correct.*

CONVICTION of murder. The opinion states the facts.

J. L. Griffiths, A. F. Potts, J. W. Gordon, R. N. Lamb and S. M. Shepard, for appellant.

T. W. Woollen, attorney-general, J. B. Elam, prosecuting attorney, J. S. Duncan, C. W. Smith and R. B. Duncan, for the State.

BIDDLE, J. Louis Guetig was indicted for the murder of Mary McGlew, convicted, and sentenced to death. He appealed to this

*To same effect, *Cunningham v. State*, (56 Miss. 209), 31 Am. Rep.

court. The judgment was reversed for an error in the lower court, and the cause remanded for a new trial. *Guetig v. The State*, 63 Ind. 278. Upon a second trial he was again convicted, and is now again under sentence of death.

[Omitting minor matters.]

1st. Richard Hill, who is admitted to be a fit juror, if his opinions did not disqualify him, when examined, stated that "he had heard of the case; but was not acquainted with defendant, or deceased, or her relations." He thought he first saw about the case in the *Daily Sentinel*; that it was simply an account of the occurrence in the papers that he read — an account of the former trial — what the parties had seen — the account set forth — the testimony of the witnesses; and he said "that he thought he probably did, from that information, form an opinion."

It was thereupon objected to the juror that he was incompetent because he said that he had based an opinion upon the testimony of witnesses in the former trial.

He was thereupon examined, on behalf of the State, as follows: "Is your opinion so fixed in your mind that it would not yield readily to the evidence introduced here, and so that you could not readily try the case as fairly and impartially as if you had never heard of it before?" To which he answered: "No; I cannot say that it would. If the evidence should differ from what I have heard of it, I think I would have to be governed by the evidence." By the court: "Would it require any effort on your part to allow the evidence to govern your opinion?" Ans. "I do not think it would." By Mr. Potts, for the defendant: "If the evidence should correspond to what you have heard, then I presume you would be governed by the original opinion you had formed?" Ans. "I think I should." "Would you, in regard to the question of guilt or innocence, and also in regard to the question of punishment to be inflicted upon the defendant in case of conviction?" Ans. "Well, it might have something to do with it." "In both cases?" Ans. "Yes, it might." For the State: "But if it should differ from what you heard, then it would be as if you had never before heard of the case?" Ans. "I do not think but what it would require but very little evidence to turn my opinion."

"The defendant challenged the juror for cause, in that the said Hill was not competent to sit as a juror in the case, in that he had formed and expressed an opinion as to the guilt or innocence of the

defendant, and could not try the case as impartially as if he had never heard of the case before."

The challenge was overruled by the court, and the defendant at the time excepted.

2d. Thomas J. Hinesly, upon his examination on the *voir dire*, stated his name, and that he resided in Washington township, Marion county, Indiana, and had, for forty-three years; and upon a general statement of the case to him, he had said, that "he had formed or expressed an opinion of the guilt or innocence of the defendant; that he had formed such an opinion from the papers. He then said he saw a report of the coroner's inquest, and a part of the report of the proceedings of the preceding trial here, in the *Journal and People*;" that "he formed an opinion as to what punishment should be inflicted if the defendant was guilty;" that "his opinion was so fixed in his mind, that it would require some evidence to remove it; yes, sir, it would;" that "he would not feel quite so free to try the case impartially and fairly, as he would if he had not heard of it;" and that "it would take some evidence to change his opinion in regard to the punishment to be inflicted; yes." By the State: "Would your mind yield readily to the evidence, or is your opinion fixed so that it would not readily yield?" Defendant's counsel objected to the question on the ground that it was incompetent, in that it called for the witness' opinion, or rather the person's being examined, as to the effect that certain evidence would have on his mind, or would probably have on his mind. The objection was overruled by the court, to which ruling the defendant at the time excepted. The juror answered: "It's not firmly fixed." "You think you can sit here and try the case upon the law and the evidence as you should hear them in the court-room?" "I think I can." "You think the impression you now have upon your mind would have no effect upon your final verdict, after having heard the law from the court and the evidence from the witnesses?" "I think not." By Major Gordon, of defendant's counsel: "You think your opinion would not be any obstruction; in other words, you would try to get rid of it?" "Yes, sir." "But are you quite certain that you could do so?" "I think I could."

Thereupon the defendant interposed challenge for cause, upon the ground that said Hinesly is "incompetent as a juror in this case, by reason of his having formed and expressed an opinion in this case touching the guilt or innocence of the accused, which

would be an obstruction to his mental operations, which it is impossible for either himself or the court to say that he can by any possible effort of the will rid himself of."

The challenge was overruled by the court, to which ruling the defendant at the time excepted.

3d. James E. Twiname, one of the jurors, on his *voire dire*, answered substantially as follows: "He resided in the city, and had for seven years; expected he had formed or expressed an opinion of the guilt or innocence of Louis Guetig, the defendant, and thought it would require evidence to remove it." And in answer to the question, "You would not feel so impartial then between the State and defendant as if you had no opinion at all?" he said, "It would take some evidence to remove the opinion." Then the question: "And if the evidence ran in the same direction as your preconceived opinion, it would then require a little less evidence to convince your mind, would it not?" He said, "I do not know; I think I could try the case impartially." He had not been on a jury during the last twelve months. He was asked: "And notwithstanding your opinion, you think you could try the case impartially?" and answered, "My mind might possibly be a little biased." "And however just and impartial you might determine to be, there would be that much difference between your mind in its present state and the mind of a person who had never heard of the case, and who had never formed an opinion about it?" "That may be possible." By the court: "Would the opinion of which you have spoken yield readily to the evidence as delivered by the witnesses, and could you, notwithstanding such opinion, give the defendant a fair and impartial trial?" Question objected to by Major Gordon, because it asked for the juror's expression of opinion as to his mental condition, and his power to lay aside a preconceived opinion upon evidence to be heard. Juror's answer: "I think I would let the evidence govern."

The defendant then challenged the juror as incompetent, in that he had formed and expressed an opinion in regard to the guilt or innocence of the defendant, which would require some evidence to remove it. The objection was overruled by the court, to which ruling the defendant at the time excepted.

The counsel for appellant base their objections to the competency of the above jurors mainly upon what they claim to be the fair interpretation of section 84 of the Code of Criminal Pleading and Practice. 2 R. S. 1876, p. 393.

It is in these words : " When the jurors are called, each may be examined on oath by either party, whether he has formed or expressed an opinion of the guilt or innocence of the defendant, and upon such examination and other questions put by leave, the court may determine upon the competency of the juror. Any juror is incompetent who has formed or expressed an opinion of the guilt or innocence of the defendant."

They also insist that the authorities support their views.

The enactment of the Code of 1831 upon this subject was as follows :

" § 93. That on the trial of any person accused of any offense against the laws of this State, it shall be lawful for a defendant or the court, to require jurors to answer on oath, whether they have formed or expressed an opinion, relative to the guilt or innocence of such accused person, and from the answer to such question and to such others as may be asked by the permission of the court, the competency of such jurors shall be determined upon by the court." R. S. 1831, pp. 197, 198.

This section was re-enacted, in the same language, in the Code of 1838. R. S. 1838, p. 222, § 93. It was also re-enacted in the Code of 1843, R. S. 1843, p. 995, § 57, in substantially the same words.

It is contended that the last sentence of the section in the present Code, namely, " Any juror is incompetent who has formed or expressed an opinion of the guilt or innocence of the defendant," was intended to express a different legislative meaning from that expressed in the previous sections ; and that any opinion of the juror, however light or transient, concerning the guilt or innocence of the defendant, disqualifies him from trying the case. Under the Codes of 1831, 1838 and 1843, it was uniformly held that an opinion formed by the juror as to the guilt or innocence of the defendant, from report or hearsay evidence, did not disqualify the juror. The first construction of section 84 in the present Code was given by this court in the case of *Bradford v. State*, 15 Ind. 347, in the following words : " In our opinion the proper construction to be placed upon this statute is, that in ordinary cases, the parties must avail themselves of the right to examine and challenge jurors, either peremptorily or for cause ; if for cause, the court, after hearing the examination, etc., exercise a sound legal discretion in determining as to the competency of the juror. One of the disabilities of a

person called is the formation or expression of an opinion, etc. It is so declared by the statute. The legal doctrine thus embodied in the statute had always been acted upon in practice in this State. To determine whether the sound legal discretion vested in the judge has been abused or properly exercised, we must, in each instance, examine the question whether the opinion of the person offered had been formed upon such information, or information derived from such a source, as would probably make such an impression as might influence him, after hearing the facts detailed on the trial. In determining this question, the court below, and this court, should be governed by the legal rules applicable in such case, and which have obtained in reference to like cases, before the enactment of the statute."

By this opinion, which has since been uniformly followed, it will be seen that the construction given to the section in the Code of 1852 is not essentially different from that given to the sections in the previous Codes; and we cannot disturb this line of decisions. If the question were still open, we should probably adopt the same course. If we were to hold to the strict construction contended for on behalf of the appellant—in this age of progress, when, by the telegraph and the press, not only local news but every important event or fact which transpires throughout the world on one day is spread before millions of readers of this nation on the next morning, and when "good and lawful men," of which juries are composed, are all readers or listeners, and while the human mind is prone to form hypothetical opinions upon every charge or report or rumor, which may be varied or contradicted by a subsequent telegram or the succeeding issue of a newspaper—it would be impracticable to impanel a jury to try any case that attracted the public attention or was the theme of public news. It cannot be held, therefore, that any or every light, transient or frivolous opinion, formed from the floating news of the day, which are often as changeable as the flying clouds, as to the guilt or innocence of a defendant, should render a juror incompetent to try his case. An opinion, to disqualify a juror, should be founded on what the juror supposes to be facts, and have such tenacity as would not readily yield to contrary evidence, and make such an impression upon the juror as would probably influence him after hearing the evidence in the case.

These rules apply only to honest and upright opinions. A pre-

tended opinion, formed out of corrupt motives, for an ulterior purpose, or through ill-will toward the defendant, whatever ground or want of ground it might have or not have to rest upon, of course would be vicious, and render the juror incompetent.

In the case before us the qualified opinion of each juror objected to was formed upon hearsay evidence or newspaper reports, not upon facts known to the juror, and was evidently of a character that would readily yield to contrary evidence. It does not seem probable to us that it could have affected the opinion of the juror with all the evidence of the case before him. We cannot say that the court exceeded a fair legal discretion in overruling the challenges for cause. The ruling, in our opinion, is fully sustained by the current of authorities. *McGregg v. State*, 4 Blackf. 101; *Van Vactor v. McKillip*, 7 id. 578; *Bradford v. State*, 15 Ind. 347; *Fahnestock v. State*, 23 id. 231; *Burk v. State*, 27 id. 430; *Morgan v. State*, 31 id. 193; *Clem v. State*, 33 id. 418; s. c., 42 id. 420; 13 Am. Rep. 369; *Cluck v. State*, 40 Ind. 263; *Scranton v. Stewart*, 52 id. 68; *Gillooley v. State*, 58 id. 182; Moore's Crim. Law, § 301; *Hart v. State*, 57 Ind. 102; *Coryell v. Stone*, 62 id. 307; *State v. Benton*, 2 Dev. & Bat. 196; *Mann v. Glover*, 2 Green (N. J.), 195.

[Omitting a minor matter.]

3. The appellant complains of the refusal by the court to give several instructions to the jury, but the only one insisted upon in the brief, and the only one, therefore, which we shall notice, is the following :

"3. It is true, that, in the absence of any countervailing fact or presumption, every person is presumed to be of sound mind; but in the case of the defendant, which you are now engaged in trying, there is opposed to the presumption of soundness of mind, the presumption that the defendant is innocent until the contrary is proved; and this presumption of the innocence of the defendant countervails and overcomes the presumption that he was of sound mind; and in the absence of any evidence on the part of the State tending to prove that the defendant was of sound mind at the time of the homicide, you ought to find the defendant not guilty."

This instruction was properly refused. We cannot regard it as the law of the case. Besides, instructions numbered 8 and 9 given by the court cover the entire ground attempted to be presented by instruction numbered 3, refused by the court.

4. The court gave to the jury the following instructions, to which exceptions were properly reserved :

“7. Frenzy arising solely from the passions of anger and jealousy, no matter how furious, is not insanity. A man with ordinary will power, which is unimpaired by disease, is required by law to govern and control his passions. If he yields to wicked passions, and purposely and maliciously slays another, he cannot escape the penalty prescribed by law, upon the ground of mental incapacity. That state of mind caused by wicked and ungovernable passions, resulting not from mental lesion, but solely from evil passions, constitutes that mental condition which the law abhors and to which the term ‘malice’ is applied. The condition of mind which usually and immediately follows the excessive use of alcoholic liquors is not the unsoundness of mind meant by our law. Voluntary drunkenness does not even palliate or excuse.

“9. The law presumes that a man is of sound mind until there is some evidence to the contrary. In prosecutions for offenses against the Criminal Code, an accused is entitled to an acquittal, if the evidence engenders a reasonable doubt as to the mental capacity at the time the alleged offense is charged to have been committed. Evidence rebutting or tending to rebut the presumption of sanity need not, to entitle the defendant to an acquittal, preponderate in favor of the accused. It will be sufficient if it raise in your minds a reasonable doubt.

“10. The presumption of innocence attends the accused step by step throughout the entire case, and he is entitled to its benefit upon every question involved, as well upon that of mental capacity as upon all others. The effect of the presumption of innocence upon the question of mental capacity is of such strength as to require that the evidence shall establish soundness of the mind beyond a reasonable doubt, but is not of such power as to require the State in the first instance, and before the introduction of evidence tending to show mental incapacity, to prove the mental capacity to have been in the normal condition usually possessed by ordinary men. The presumption of innocence is so far of greater strength than that of sanity, that when evidence appears tending to prove insanity, it compels the prosecution to establish, from all the evidence, mental soundness beyond a reasonable doubt.

“13. The opinions of medical experts are to be considered by you, in connection with all the other evidence in the case ; but you

are not bound to act upon them to the entire exclusion of other testimony. Taking into consideration these opinions, and giving them just weight, you are to determine for yourselves, from the whole evidence, whether the accused was or was not of sound mind, yielding him the benefit of a reasonable doubt, if such arises from the evidence.

"15. You are not to take for granted that the statements contained in the hypothetical questions which have been propounded to the witnesses are true. Upon the contrary, you are to carefully scrutinize the evidence, and from that determine, what, if any, of the averments are true; and what, if any, are not true. Should you find from the evidence that some of the material statements therein contained are not correct, and that they are of such a character as to entirely destroy the reliability of opinions based upon the hypothesis stated, you may attach no weight whatever to the opinions based thereon. You are to determine, from all the evidence, what the real facts are, and whether they are correctly or not stated in the hypothetical question or questions. I need hardly remind you (for it will suggest itself to your own minds), that an opinion based upon an hypothesis wholly incorrectly assumed, or incorrect in its material facts, and to such an extent as to impair the value of the opinion, is of little or no weight. Upon the matters stated in these hypothetical questions, and which are involved in this investigation, you are to give the defendant the benefit of all reasonable doubt, if any there should be; and where there is a reasonable doubt as to the truth of any one of the material facts stated, resolve it in the defendant's favor."

Counsel for appellant object particularly to the first sentence of instruction numbered 7. It is true, that that sentence does not state a legal proposition. It only says that "Frenzy arising solely from the passions of anger and jealousy, no matter how furious, is not insanity." This is, doubtless, correct. Frenzy arising from passion of any kind is violent and temporary, and would subside with the passion. Insanity may be without violence and permanent, and not in any way caused by passion. We think the sentence is harmless. It does not appear to us that it could possibly have injured the appellant.

It affords no ground, therefore, to reverse the judgment. The remainder of the instruction is correct; indeed, we do not understand the counsel as objecting to any part of it except the first sentence.

In our opinion instruction numbered 9 is so clearly right that we do not discuss it.

We can scarcely approve of the last sentence of instruction numbered 10; but it contains nothing of which the appellant can complain. If it is erroneous, the error is in his favor. It is true, that if the defendant introduced sufficient evidence to raise a reasonable doubt of his soundness of mind, it then would become necessary for the State, if she insisted upon a conviction, to prove the defendant's mental soundness beyond a reasonable doubt; but there may be evidence tending to prove insanity, and not be sufficiently strong to raise a reasonable doubt of mental soundness. In this we think the proposition is incorrect. But the error, being against the State, the appellant is not injured thereby. The remaining portion of the instruction is correct.

Instructions numbered 13 and 15 properly express the law, and are fully sustained by the authorities cited under question numbered 2, already discussed.

[Omitting minor points.]

We have thus carefully examined all the questions presented for our consideration on behalf of the appellant. There is nothing in the record to show us that the appellant was not indicted, tried and convicted according to the law and the facts of the case.

The judgment is therefore affirmed, at the costs of the appellant.

Judgment affirmed.

NOTE BY THE REPORTER.—The New York statute of 1872 enacts that "the previous formation or expression of an opinion, or impression in reference to the circumstances upon which any criminal action at law is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, shall not be a sufficient ground of challenge for principal cause to any person who is otherwise legally qualified to serve as a juror upon the trial of such action; provided the person proposed as a juror, who may have formed or expressed or has such opinion or impression as aforesaid, shall declare on oath, that he verily believes he can render an impartial verdict according to the evidence submitted to the jury on such trial, and that such previously formed opinion or impression will not bias or influence his verdict, and provided the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror."

In *Cox v. People*, N. Y. Court of Appeals, April 6, 1880, a juror, on his *voir dire*, testified that he had formed an opinion from reading the newspapers; that he believed what he read in the newspapers until he saw it contradicted; that in that sense he had an opinion of the guilt of the prisoner; that he had no knowledge whether the statements he had read were true or not, and that his opinion was a contingent one based upon the supposed truth of the statements read. He also testified that he had no pride of opinion and had no doubt of his ability to set aside the opinion he had on entering the jury-box and decide the case according to the evidence submitted without being influenced by what he had read. *Held*, that under the statutes of 1872 and 1873, a challenge to him on the ground that he had formed an opinion was properly overruled.

Yandes v. Wright.

In commenting on this case the *Albany Live Journal* (vol. 21, p. 322) says:

"The newspapers hail this as a great triumph of 'reform.' The *New York Times* says that the old rule that 'a person who had formed a settled opinion of the guilt or innocence of the prisoner was thereby disqualified as a juror, and this disqualification could not be removed by the sworn statement of the person that he believed he could decide the case fairly and impartially according to the evidence, and that he would not be biased or prejudiced by his previously-formed opinion,' was 'absurd,' and 'but one of the barbarous relics of the early jury that have so long resisted the influence of progress and civilization.' The truth is the rule never was 'absurd,' and would not now be 'absurd,' if it were practicable in modern times. It is a just and wholesome rule, and never would have been relaxed or modified, but for the enormous multiplication of newspapers in recent times, and the consequent difficulty in finding competent jurors who have not formed some opinion or derived some impression of a notorious case. But it is not now true, any more than formerly, that a man is competent as a juror, who has, as the *Times* says, 'formed a settled opinion of the guilt or innocence of the prisoner.' Of course the present ruling is a good one for newspapers, which universally believe that no man can be fit for jury duty who does not read their criminal news. Many wise men in old times never saw a newspaper, and many wise men now-a-days do not read the criminal news, but the inconvenience of sifting the community to find these men counterbalances the weight of the old rule, and induces legislatures and courts reluctantly to relax it. We have even now grave doubts whether the relaxation in capital cases is justifiable, for in effect it casts the burden on the prisoner of proving his innocence, in compelling him by evidence to change an opinion in the minds of jurors that he is guilty. Judge ANDREWS says in the opinion in the *Cox* case: 'But I am not prepared to say that such an assumption is contrary to the constitution of the human mind or the laws of mental action, or that it may not frequently happen that persons who have formed opinions of the guilt of an accused person from reports or statements, verbal or written, may not as jurors lay aside their prepossessions and not only honestly and conscientiously endeavor to hear and decide the case upon the evidence alone, but be able, in fact, to divest themselves of the influence of their previous opinions.' Granting this change of mind may 'frequently happen,' it does not seem a very comfortable assurance for a man whose life is at stake, who is told that he is presumed innocent, and who is entitled to an impartial jury."

See note, 2 Am. Cr. Rep. 252.

YANDES v. WRIGHT.

(66 Ind. 319.)

Mines — support of surface.

A, the owner of lands in fee, granted to B. "the sole right to dig, mine, use or sell clay situated on" such land, and also the right to dig and mine coal on the same land. Afterward he granted to C. the right to have, hold and possess all the coal, iron, lead, and all other productions, vegetable and mineral, "under the surface, except the clay and stone heretofore let" to B. The assignee of B, in mining under a mine dug by the assignee of C, neglected to leave sufficient supports for the ground overhead, which sank and destroyed the upper mine. *Held*, that the owner of the lower mine was liable in damages to the owner of the upper.

ACTION of damages for destroying mine. The opinion states the case. The plaintiff had judgment below.

I. M. Compton, C. Matson, S. W. Curtis and Holliday, for appellants.

G. A. Knight and C. H. Knight, for appellee.

BIDDLE, J. On the 21st day of October, 1864, David Cornwell, the lessor, granted to the appellee and George Elbreg "the sole right to dig, mine, use or sell clay situated on the" land described in the lease, ("except such clay as the first party may dig for potter's use.") Also the right to dig and mine coal on the same premises. Elbreg assigned his interest in the grant to the appellee, by which he holds the entire right under it.

On the 31st day of August, 1865, David Cornwell granted to Elberg, Montgomery & Co. a right in the same lands "to have, hold and possess all the coal, iron, lead and all other productions, whether of a vegetable or mineral origin, under the surface, except, however, all the clay and stone heretofore let to Wright & Elbreg." This grant was assigned by Elbreg, Montgomery & Co. to the appellants, thus giving them the entire right to the things granted, subject to the grant before made to the appellee.

Each grant run for the term of twenty-five years, and each party entered upon his premises, commenced and prosecuted his mining operations. The grant of the appellants lies about thirty feet below the grant of the appellee, in the direct line of gravitation.

The appellee, as plaintiff below, avers in his complaint, that appellants, the defendants below, without any negligence on the part of the plaintiff, so negligently, carelessly and unskillfully located and insecurely constructed a certain entry or room, underlying an entry made by plaintiff in said clay strata, and so carelessly managed and insecurely propped the same as to cause, by the said negligence, carelessness and unskillfulness, the intervening strata of rock, slate and other substances to cave and fall in, and thereby destroy and render wholly useless one of the main entrances constructed by plaintiffs, leading into said strata and veins. By reason of which, etc. Wherefore, etc.

The complaint was tested by a demurrer, alleging the insufficiency of the facts as ground, and held by the court to be sufficient.

Answer, general denial. Trial by jury, and verdict for appellee.

Judgment on the verdict, over a motion for a new trial and exception. Appeal.

The appellants present three questions for our consideration, in their brief. 1. The sufficiency of the complaint; 2. The propriety of the instructions; and, 3. The sufficiency of the evidence to sustain the verdict.

1. The complaint is sufficient, whether the law is as claimed by the appellants or as claimed by the appellee. Indeed, this point may be held as waived in the brief of the appellants.

2. The instructions: It is contended by the appellants, that if the owner of the lower mines removed his minerals in the usual and proper course of mining, without negligence or wrong on his part, in leaving the proper supports for the upper mine, he will not be liable for damages caused by the natural effect of the laws of gravitation.

The appellee insists, that if the owner of the lower mine, in removing his minerals, so weakened the support of the surface in its natural condition as to cause its subsidence, and thereby injure the upper mine, he will be liable for all damages that ensue therefrom; and that no degree of care, skill or diligence, exercised in his mining operations, will excuse him from such liability.

We need not set out the instructions complained of, for it is plain, that, if the appellants are right in their view of the law, the instructions given were erroneous, and those refused correct; but, if the appellee is right in what he claims to be the law, then the instructions given were proper, and those refused erroneous.

This question is carefully examined and decided in the case of *Humphries v. Brogden*, 12 Q. B. 739.

In that case, "It appeared that the company had taken the coals under the plaintiff's closes, without leaving any sufficient pillars to support the surface, whereby the closes had swagged and sunk, and had been considerably injured; but that supposing the surface and the minerals to have belonged to the same person, these operations had not been conducted carelessly or negligently or contrary to the custom of the country. The jury found that the company had worked carefully and according to the custom of the country, but without leaving sufficient pillars or supports; and a verdict was entered for the plaintiff for one hundred and ten pounds damages, with leave to enter a verdict for the defendant, if the court should be of opinion that under the circumstances the action was not maintainable."

Lord CAMPBELL, C. J., in delivering the opinion of the court, says: "We have attempted without success to obtain from the Codes and Jurists of other nations information and assistance respecting the rights and obligations of persons to whom sections of the soil, divided horizontally, belong as separate properties. This penury, where the subject of servitudes is so copiously and indiscriminately treated, probably proceeds from the subdivisions of the surface of the land and the minerals under it into separate holdings being peculiar to England." But his lordship cites and analyzes a number of authorities which, more or less directly, support his opinion. He concludes by quoting the following extract from Erskine's Institute of the Law of Scotland. Book II, title 9, § 11, and note: "Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh, the proprietor of the ground floor is bound merely by the nature and condition of his property, without any * * servitude, not only to bear the weight of the upper story, but to repair his own property, that it may be capable of bearing that weight. The proprietor of the ground story is obliged to uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower." His lordship then sums up the case in the following words: "For these reasons, we are all of opinion that the present action is maintainable, notwithstanding the negation of negligence in the working of the mines, and that the rule to enter a verdict for the defendant must be discharged."

We have found some English authorities besides those cited by Lord Chief Justice CAMPBELL, in *Humphries v. Brogden*, *supra*, and some subsequently decided; and also some American authorities. The right of *surface support* is treated by Blanchard & Weeks' Leading Cases on Mines, etc., 616-619, wherein they lay down the common-law rule, and refer to several authorities in support of it, in the following words: "There is a *prima facie* inference at common law upon every demise of minerals or other subjacent strata, where the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support. In the absence of express words, showing clearly that he has waived or qualified his right, the presumption is that what he retains is to be enjoyed by him *modo et forma*, and with the natural support which it possessed before the demise."

In Wood on Nuisances, § 194, the rule is expressed as follows: "When there is a simple conveyance of the surface, reserving the mines, with the right to enter upon the surface to work the same, and no express power given or reserved to reduce a subsidence of the surface, if necessary in the working of the mines, the person owning the minerals is bound at his peril not to cause a subsidence of the surface, even though he cannot work his mines at all without doing so; and no degree of care or skill exercised in the mining operations will shield him from liability to the owner of the surface for all damages sustained by reason of the subsidence thereof."

In deciding the case of *Jones v. Wagner*, 66 Penn. St. 429; s. c., 5 Am. Rep. 385, THOMPSON, C. J., said:

"The right of supports, *ex jure naturæ*, which the owner of the soil is entitled to receive from the minerals underneath, has, within comparatively a few years, received much attention in the courts in England, and the rule deducible from the cases in all the courts, the House of Lords, Exchequer and Queen's Bench, is, that where there is no restriction or contract to the contrary, the subterranean or mining property is subservient to the surface to the extent of sufficient supports to sustain the latter, or in default, there is a liability to damages by the owners or workers of the former for any injury consequent thereon to the latter. * * *

"That if an owner of lands grant a lease of the minerals beneath the surface with power to work and get them in the most general terms, still the lessee must leave a reasonable support for the surface, and so conversely, where the minerals are demised and the surface is retained by the lessor, there arises a *prima facie* inference at common law, upon every such demise, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right of support."

"These citations prove two things, viz.: that the owner of a mineral estate, if the law be not controlled by the conveyance, owes a servitude to the superincumbent estate, of sufficient supports; consequently the failure to do so is negligence, and so may be declared upon."

In the case of *Coleman v. Chadwick*, 80 Penn. St. 81, it was held that, "When the owner of the whole fee grants the minerals, reserving the surface, his grantee is entitled only to so much of the minerals as he can get without injury to the surface."

The following authorities maintain the same principle: *Horner*

v. *Watson*, 79 Penn. St. 242; s. c., 21 Am. Rep. 55; *Marrin v. Brewster Iron Mining Co.*, 55 N. Y. 538; s. c., 14 Am. Rep. 322; *Wakefield v. Duke of Buccleuch*, L. R., 4 Eq. Cas. 613; *Harris v. Ryding*, 5 M. & W. 60; *Dugdale v. Robertson*, 3 Kay & J. 695; Bainbridge on Mines and Minerals, 485.

It should be noticed throughout the cases above cited, that the word "surface," as used in the books, means not merely the geometrical superficies without thickness, but includes whatever earth, soil or land lies above and superincumbent on the mine. Surface, therefore, includes the appellee's mine which lies above the appellant's mine and below the top surface, which still may remain undisturbed and uninjured, in the original grantor. *Humphries v. Brogden*, *supra*. See also, as to the meaning of the word "surface," 2 Abb. Law Dic., title Surface, and *Burkhardt v. Hanley*, 23 Ohio St. 558.

We have also carefully examined the cases cited by the appellants, and find none that conflicts with the above views. They all touch mainly upon the rights in flowing water, used in mining, in which only a usufruct interest can be held, and which is very different from the permanent right which may be obtained in the solid surface superincumbent upon a mine. They are, therefore, not in point.

3. As to the sufficiency of the evidence to sustain the verdict: When no more negligence need be proved than the failure to furnish supports for the superincumbent mine, we think it is abundant.

The judgment is affirmed, at the costs of the appellants.

Judgment affirmed.

HINDS V. OVERACKER.

(66 Ind. 547.)

Master and servant — action — negligence — servant against co-servant.

An action will lie in favor of one employee against a co-employee for physical injury caused to the former by the latter's negligence in the same undertaking. (*See note, p. 115.*)

ACTION of damages for injury by negligence. The opinion states the case. The plaintiff had judgment below.

Hinds v. Overacker.

A. Anderson, W. G. George, — Pfleger, W. H. Calkins and D. J. Wile, for appellant.

L. A. Cole and L. Hubbard, for appellee.

PERKINS, J. The appellee sued the appellant, to recover compensation in damages for an injury he sustained through the alleged negligence of the latter. Judgment below for the appellee for one thousand dollars.

This case originated in the disaster described in *Hinds v. Harbou*, 58 Ind. 121. The appellee was an *employee* in the building mentioned in said description, and was injured by its fall.

It was contended in this, as it was in that, case, that an action would not lie by one servant against a co-servant in the same undertaking; but it was decided in that case that such an action would lie, in a proper case.

[Omitting minor matters.]

The judgment is affirmed, with costs, as of the date of the submission of the cause.

Judgment affirmed.

NOTE BY THE REPORTER. — In *Hinds v. Harbou*, 58 Ind. 121, where it is said: "We do not clearly perceive how it can well be that in the little community of employees of the same employer, upon the same general undertaking, the common duties of man to man in society generally should cease to exist, and as a consequence, liability for breaches of them." *Albro v. Jaquith*, 4 Gray, 99, holds the contrary, the court saying: "Many of the considerations of justice and policy, which led to the adoption of the general rule, now perfectly well established, that a party who employs several persons in one common enterprise or undertaking is not responsible to any one of them for the injurious consequences of the mere negligence or carelessness of the others in the performance of their respective duties, have an equal significance and force when applied to actions brought by one servant against another. In the latter as in the former case, they are presumed to understand and appreciate the ordinary risk and peril incident to the service in which they are to be employed, and to predicate the compensation they are to receive in some measure upon the extent of the hazard they assume." There is a dictum to the same effect by POLLOCK, C. B., in *Southcote v. Stanley*, 1 H. & N. 247. In speaking of *Albro v. Jaquith* it is said in *Shearman & Redfield on Negligence*, § 112: "We are satisfied that the weight of reason and authority is in favor of holding a servant liable to his fellow-servants for injuries suffered by them through his personal negligence. Servants do not necessarily or commonly make any bargain with each other, express or implied, for exemption from such liability; and if it is true that they consider the risk in fixing their wages, the implied contract thus entered into is not made for the benefit of the other servants, nor have the latter any interest in it." And in *Wharton on Negligence*, § 245, it is said of that case, "unless the negligence be one of the risks which the injured servant assumed, this position cannot be sustained."

CASES
IN THE
SUPREME COURT
OF
IOWA.

JONES V. LEONARD.

(50 Iowa, 106.)

Extradition — who is a fugitive.

A citizen and resident of one State, charged in a requisition with the constructive commission of crime in another State, from which in fact he has never fled, is not a fugitive from justice, and the determination of the governor as to the sufficiency of the facts alleged is not conclusive.

HABEAS CORPUS. The plaintiffs were indicted in Massachusetts for false pretenses, and on requisition the governor of Iowa issued a warrant, on which the defendant, as sheriff, arrested them. The other facts appear in the opinion. The plaintiffs were discharged below.

Davison & Lane, for appellant.

Rose & Linsley, Bills & Block and Cook & Richman, for appellees.

SEEVERS, J. The learned judge of the Circuit Court discharged the plaintiffs from custody, as we infer, on two grounds: *First*, that the plaintiffs were not in fact fugitives from justice, for the reason that they had never fled; and *second*, the evidence accom-

panying the requisition failed to show they were such ; and appellees mainly, if not entirely, rely thereon for an affirmance. It is not claimed the plaintiffs were ever even temporarily residents of the State of Massachusetts. At the time the alleged crime was committed they were citizens of and residents of this State.

The false pretense was contained in a letter written by them in this State to certain persons in Boston, in which it was stated they owned a large amount of property over and above their indebtedness, by means of which they obtained on credit certain merchandise.

The Constitution of the United States provides that "a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

It is provided by a statute of this State that the requisition of the governor of another State "shall be accompanied by sworn evidence that the party charged is a fugitive from justice." Code, § 4174.

The sworn evidence accompanying the requisition consisted of an affidavit in which it was stated the plaintiffs "are fugitives from justice." There are grave doubts whether such a statement constitutes the evidence required by the statute. Whether the plaintiffs were such fugitives is a mixed question of law and fact. The latter being stated or ascertained, a legal conclusion would follow or be based thereon. Instead of stating facts, the affidavit states nothing more than the legal conclusion of the person making the affidavit. The statute requires the governor to determine whether or not the person or persons are fugitives from justice. Sworn evidence is to be submitted to him to enable him to do so. Such evidence may be in the form of affidavits. But instead of any facts being stated, upon which an independent judgment could be formed, the governor must have relied wholly on the legal conclusion of another.

It seems to us that to sanction such a proceeding would be establishing a dangerous precedent. By issuing his warrant for the arrest of the plaintiffs it may be said the governor has determined this question. But this does not conclude all inquiry by the courts as to the sufficiency of the evidence upon which his conclusion was based. It may be conceded that the affidavit was *prima facie* sufficient, or rather it was the province of the governor to so determine. But this we do not think is conclusive upon this or any other question connected with the extradition of the citizen. This point will

be further noticed hereafter. Conceding, however, that the determination of the governor is conclusive as to the sufficiency of the affidavit, we have for determination the question whether the plaintiffs are in fact fugitives from justice.

Bouvier defines such a person to be "one who, having committed a crime in one jurisdiction, goes into another in order to evade the law and avoid punishment" (1 Bouvier's Law Dictionary, 551); and the Constitution of the United States defines such person to be one "who shall flee from justice."

It is difficult to see how one can flee who stands still. That there must be an actual fleeing we think is clearly recognized by the Constitution of the United States. The words "who shall flee" do not include a person who never was in the country from which he is said to have fled.

It is urged, however, that the plaintiffs were constructively in Massachusetts at the time the crime is alleged to have been committed, and that they have constructively fled therefrom.

In *People v. Adams*, 3 Den. 190, it was held that a person actually a resident of Ohio could commit a crime in New York, and upon his coming voluntarily into the last-named State he could be there tried and convicted. We are not required to either approve or disapprove the doctrine laid down in this case, and it will be presumed the laws of Massachusetts are the same as those of New York in this respect. In the cited case the defendant went voluntarily into the State of New York, and it might with much propriety be said that having so done, he was amenable to the laws thereof.

The question in the case at bar is very different. Granting that a crime may be thus committed, the question before us is whether then the State of Iowa is bound to surrender a citizen to the State in which the crime was committed? This depends upon the obligation in this respect imposed by the Constitution of the United States. Before it can be said there is such an obligation, two things must appear. There must be, first, a crime charged; and second, that the person charged is a fugitive from justice; that is to say, "that he has fled from the State in which he is charged with the crime to escape punishment." Such must be the legal effect of his fleeing. In other words, he must have been in the State, committed the crime, and fled.

The Constitution of the United States does not require Iowa to surrender, on the demand of a sister State, as a fugitive from justice,

Brunswick v. Valleau.

one who only constructively has fled from the latter. Hurd on Habeas Corpus (2d ed.), 612.

If the decision of the governor is final and conclusive as to this question, it must be so as to all questions touching the extradition of a citizen under the constitutional provision above quoted. Counsel for the appellant concede there are cases in which a writ of *habeas corpus* may issue, and the prisoner be discharged. In fact, the power of the courts at this day cannot be seriously questioned. Hurd on Habeas Corpus (2d ed.), 621; *In the matter of Manchester*, 5 Cal. 237; *Ex parte Smith*, 3 McLean, 121.

The governor of this State is not clothed with judicial powers, and there is no provision of the Constitution or laws of the United States or of this State which provides that his determination is final and conclusive in the case of the extradition of the citizen.

In the absence of such a provision we hold that the decision of the governor only makes a *prima facie* case; that it is competent for the courts, in a proceeding of this character, to inquire into the correctness of his decision, and discharge the prisoner.

Judgment affirmed.

BRUNSWICK V. VALLEAU.

(30 Iowa, 120.)

Sale — article which may be unlawfully used.

In an action for the price of a billiard table it is no defense that it may be used for gambling, unless it was sold under a contract that it was so to be used, and knowledge of such intended use will not be inferred from the fact that it was accompanied by a pool set and rules for its use. (*See note*, p. 122.)

ACTION on promissory notes. The answer avers that the sole consideration of the notes was "two billiard tables sold by plaintiff to defendant in Iowa, with the knowledge, understanding, agreement, intent and purpose on the part of plaintiff and defendant that the same were to be and should be used in the town of Decorah, Iowa, as implements for gambling, in violation of the statutes of Iowa, and that in pursuance of such intent the tables were so used." Judgment for plaintiff.

Willett & Wellington, for appellant.

E. E. Cooley, M. N. Johnson & Bro. and G. L. Faust, for appellee.

ADAMS, J. I. The court gave an instruction which is in the following words: "You are instructed, as matter of law, that the mere fact that the plaintiff had knowledge that the tables were to be used for the purpose of playing games, to-wit: pin-pool and billiards, thereon, constitutes no defense to plaintiff's action on the notes. In addition to the knowledge on the part of plaintiff that the tables were to be used for such gambling purposes, it must further appear from the evidence that it was a part of the contract that they should be so used, and that the plaintiff has done something in aid or furtherance of the unlawful design beyond the mere sale with knowledge of the illegal intent of the purchaser." The giving of this instruction is assigned as error.

The doctrine of the instruction was held in *Tracy v. Talmadge*, 14 N. Y. 162. It was held, however, in *Spurgeon v. McElwein*, 6 Ohio, 442, that a carpenter could not recover for labor done in erecting a nine-pin alley, appurtenant to a coffee-house.

By statute it was provided that it should be unlawful for tavern keepers and retailers of spirituous liquors to keep a nine-pin alley in connection with their business; and it was held that the plaintiff who built the nine-pin alley should be deemed to have knowledge that it was to be used as a nine-pin alley in connection with the so-called coffee-house, which use, it seems to be conceded, would have been unlawful. There was no contract that the nine-pin alley should be used as such, nor had the plaintiff any interest in it, nor did he do any thing to promote its use as a nine-pin alley except to construct it. The court, however, said: "If one intends to aid another in an illegal object he shall not be assisted by the law." The defendant relies upon this case as holding the doctrine for which he contends. It is not, we think, to be denied that it holds a different doctrine from the instruction. But the plaintiff claims that if the court erred in the instruction it was error without prejudice, and we think that this position is well taken. The mere keeping of billiard tables is not unlawful, as was the keeping of the nine-pin alley in connection with the coffee-house; nor is the use of billiard tables as such unlawful. Gambling is no

part of the game of billiards. It may be done in connection with the game, as it may in connection with cards, or chess, or croquet, but gambling does not inhere in the game itself. The counsel for the defendant would concede this, but they maintain that it is shown in evidence that the tables were sold to be used in a saloon, and that they were so used; and that gambling is nearly always done in connection with the game of billiards in a saloon, while it is only occasionally done with cards; and so the sale of billiard tables to be used in a saloon must be deemed to be unlawful, while the sale of a pack of cards ordinarily would not be. In our opinion the distinction does not rest upon any legal foundation. The sale of cards, with knowledge that they are to be used in gambling, would, under the doctrine of *Spurgeon v. McElwein*, be unlawful; and if cards were made for no other purpose the seller, under the authority of that case, would be deemed to have knowledge that they were to be used in gambling. Without such knowledge the sale is not unlawful.

It is urged, however, by the defendant that the plaintiff did have knowledge that the tables were to be used in gambling. They rely not only upon the fact that the plaintiff knew that they were to be used in a saloon, where, as the evidence shows, gambling is almost universally carried on in connection with billiard tables, but upon the fact that there was sold in connection with the tables what is called a pin-pool set, and printed rules for playing the pin-pool game. These rules are introduced in evidence, and it is claimed that gambling is a part of the game as therein laid down. The rule relied upon more especially is in these words:

“If a player neglects to claim the pool when he has made it before the next play, he must wait until his turn to play comes again, when he may declare pool; but if another makes pool in the meantime, that other is entitled to it.”

It is said that pool means stakes, and so the rule contemplates playing for stakes. The testimony of persons acquainted with the game was introduced, but we have to say that it fails to satisfy us that the word *pool*, as used in the game, necessarily means stakes.

It appears to us to be a word applied to the result in favor of the winner, and that money or some other valuable thing may or may not be staked upon the result, as the parties agree.

In our opinion the law is that where an article has a lawful use, and has no unlawful use except as a mere incident to the lawful

use, the vendor is not bound to presume that it will be used unlawfully, and will not, therefore, be deemed to have knowledge that it will be. Knowledge of the unlawful intention must be distinctly shown. 1 Dan. Neg. Inst. 159. In this case the knowledge is not distinctly shown.

Judgment affirmed.

NOTE BY THE REPORTER.—To same effect, *Hubbard v. Moore*, 24 La. Ann. 591; s. c., 13 Am. Rep. 128; *Mahood v. Tealza*, 23 La. Ann. 108; s. c., 21 Am. Rep. 546; *Michad v. Bacon*, 49 Mo. 474; s. c., 8 Am. Rep. 138, and note, 140

The review of authorities in *Tracy v. Talmage*, 14 N. Y. 182, is so complete that we subjoin some portions of the opinion: "The question presented upon this branch of the case is, whether the bare knowledge by a vendor that the purchaser intends to make an unlawful use of the article sold will prevent a recovery for the purchase-money. Although I deem this question clear upon principle, I shall, nevertheless, rest my opinion in regard to it mainly upon the authorities."

"A question somewhat analogous arose in the court of King's Bench, in England, in the case of *Falkney v. Reynous*, 4 Burr. 2089. The plaintiff and one of the defendants had been jointly concerned in stock jobbing; and the plaintiff, in contravention of an express statute, had advanced £3,000, in compounding certain differences, for one-half of which the defendants had given the bond upon which the action was brought. Upon demurrer to a plea setting up these facts, the court held the plaintiff entitled to recover. Although that case differs from the one under consideration, in its facts, yet the principle upon which the case was decided, viz., that a party to a contract, innocent in itself, is not responsible for or affected by the use which the other may make of the subject of the contract, is equally applicable here. Lord MANSFIELD said, in speaking of the act of the defendant in giving the bond: '*This is not prohibited. He is not concerned in the use which the other makes of the money; he may apply it as he thinks proper. But certainly this is a fair, honest transaction between these two.*'"

"There is a class of English cases which seems to me identical in principle with the present, and concerning which the decisions have been unvarying. I refer to the cases of goods purchased for the express purpose of being smuggled into England, in violation of the revenue laws, and where the object of the purchase was known to the vendor. The first of these cases is that of *Holman v. Johnson*, Cowp. 341, where the plaintiff, residing at Dunkirk, had sold to the defendant a quantity of tea knowing that the latter intended to smuggle it into England, but had himself no concern in the smuggling. The action was brought for the price of the tea; and it was held upon these facts, that the plaintiff could recover. The principle of the case is the same as that adopted in *Falkney v. Reynous*, *supra*, that mere knowledge by the vendor of the unlawful intent did not make him a participator in the guilt of the purchaser. Lord MANSFIELD, who delivered the opinion in the case, also says: 'The seller indeed knows what the buyer is going to do with the goods; but the interest of the vendor is totally at an end, and his contract complete by the delivery of the goods.'

"Where, however, the seller does any act which is calculated to facilitate the smuggling, such as packing the goods in a particular manner, he is regarded as *particeps criminis* and cannot recover, as is shown by the subsequent cases of *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Penahuna*, 4 id. 486, and *Waymell v. Reed*, 5 id. 599. These were all cases where the plaintiff had sold goods to the defendant, knowing that they were to be smuggled into England; and in each of them the plaintiff was consulted. But they all differed from the case of *Holman v. Johnson*, in this, that the plaintiff had in each case done some act in addition to the sale, in aid and furtherance of the defendants' design to violate the revenue laws, and the decision was in each case placed distinctly upon this ground. The language of BULLER, J., in the case of *Waymell v. Reed* is very explicit. He says: 'In *Holman v. Johnson*, the seller did not assist the buyer in the smuggling. He merely sold the goods in the common and ordinary course

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of trade. But this case does not rest merely on the circumstance of the plaintiff's knowledge of the use intended to be made of the goods, for he actually assisted the defendants in the act of smuggling, by packing the goods up in a manner most convenient for that purpose.'

"In each of the three cases last cited, special care is taken to guard against any inference that it was intended to impair the force of the decision in *Holman v. Johnson*. Indeed, that decision seems to have been uniformly followed by the courts of England from that day to the present. In 1835 the question again arose in the case of *Pellecat v. Angell*, 2 Crompt., Mees. & Ros. 311, and the court held that the plaintiff could recover the price of goods sold to the defendant, although he knew at the time of the sale that they were bought to be smuggled into England. Lord ABINGER says: 'The distinction is, where he takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels, or otherwise, there he must take the consequences of his own act.' Again he says: 'The plaintiff sold the goods, the defendant might smuggle them if he liked, or he might change his mind the next day; it does not at all import a contract, of which the smuggling was an essential part.' It is true the chief baron in one part of his opinion seems to lay some stress upon the fact that the plaintiff was a foreigner; but it is clear that this can have nothing to do with the principle upon which those cases rest, which is, that the act of selling is not in itself a violation of the law; and the mere fact of knowledge of the unlawful intent of the vendee does not make the vendor a participator in the guilt. The language of the associates of the chief baron goes to show that the domicile of the plaintiff had no influence upon the decision. BOLLAND, B., says: 'I think the distinction pointed out by the lord chief baron between merely knowing of the illegal purpose and being a party to it by some act, is the true one.' ALDERSON, B., says: 'If the plea disclosed circumstances from which it followed, that permitting the plaintiff to recover would be permitting him to receive the fruits of an illegal act, the argument for the defendant would be right; but that ground fails, because the mere sale to a party, although he may intend to commit an illegal act, is no breach of law.' That the place of residence of the vendor has nothing to do with the question, and that the principle of the case of *Holman v. Johnson* is sound, is further shown by the case of *Hodgson v. Temple*, 5 Taunt. 181, decided by the Court of Common Pleas in England. There, as it would seem, all the parties resided in London. The plaintiffs, who were distillers, had sold spirituous liquors to the defendant with full knowledge that the latter intended to retail them, in express violation of the revenue laws. It was insisted, in defense to an action brought for the purchase-money of the liquors, that the plaintiffs were *particeps criminis*, and could not recover. But MANSFIELD, C. J., said: 'This would be carrying the law much further than it has ever yet been carried. The merely selling goods knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment; but to effect that it is necessary that the vendor should be a sharer in the illegal transaction.'

"Opposed to this series of cases, holding one uniform language, and sanctioned by such names as MANSFIELD, BULLER, KENYON, ABINGER and others, I know of but a single case, viz., that of *Langton and others v. Hughes*, 1 Maule & Sel. 593. By a statute of 42 Geo. III. brewers were prohibited from using any thing but malt and hops in the brewing of beer. The plaintiffs, who were druggists, had sold to the defendants, who were brewers, certain drugs, knowing that they were to be used contrary to the statute. In the 51 Geo. III. another statute was passed, prohibiting druggists from selling to brewers certain articles, and among them those sold to defendants. The sale in question was made before the latter statute, but the suit was brought afterward. The court held that the plaintiff could not recover. It is difficult to ascertain from the opinions the precise ground upon which the court intended to rest its decision. The case was so clearly within the terms of 51 Geo. III. that the judges were evidently induced to resort to a somewhat strained construction of the previous statute, and even to an attempt to connect that with the statute passed after the sale, for the sake of sustaining the defense. LE BLANC, J., after stating the question, says: 'That depends upon the provisions of 42 Geo. III., coupling them in their construction with those of 51 Geo. III.' It is apparent, I think, upon a review of the whole case, that it was not very well considered, and that the decision was really produced by

the reflex influence of the latter statute. This case, therefore, which does not appear to have been followed either in England or in this country, and which is virtually overruled by the subsequent case of *Pellecat v. Angell*, 2 Crompt., Mees. & Ros. 311, can have but little weight in opposition to the numerous authorities to which I have referred, going to establish the contrary principle.

"There is another class of English cases which have been sometimes supposed to conflict with the doctrine advanced in *Faikney v. Reynolds* and *Holman v. Johnson*, *supra*, but which, when the precise ground upon which they were decided is considered, will be found to support rather than to detract from the doctrine. That ground is this: That it was the express object of the plaintiffs in those cases, in selling the goods or lending the money, that they should be used for an unlawful purpose, and that such purpose entered into and formed a part of the contract of sale or loan. A brief reference to these cases will show that this is the principle upon which they rest. The first case of this class is that of *Lightfoot et al. v. Tennant*, 1 Bos. & Pull. 551. The action was upon a bond given for goods sold and the defendant pleaded that the plaintiff sold the goods 'in order that' they should be shipped to the East Indies without the license of the East Indian Company, in violation of an express statute. The issue upon this plea was found for the defendant, and a motion for judgment *non obstante veredicto* was denied. EYRE, C. J., argues that the jury have found that the plaintiff sold the goods 'in order that' they should be shipped, etc.; it cannot be said that he had no interest in their future destination: that he may well have sold the goods for an enhanced price, relying exclusively upon the profits to be realized from the illicit trade for payment. He says: 'It is a possible case, that a tradesman may wish to speculate in the contraband trade, and to do it by dividing the profits with some man of spirit and enterprise, but without capital. Such a man would stipulate that the goods he sold should be put on board a ship under a foreign commission, and should be sent to Calcutta there to be sold. His share of the profits would be found in the price originally fixed on the goods, but his hopes of payment would rest entirely on the returns of this contraband trade.' Again he says: 'But the jury having found for the plea, the court cannot say that the plaintiff had nothing to do with the future destination of the goods; unless it was impossible to state a case in which they could have any thing to do with it. The decision in this case clearly is based upon the fact, that the future use to be made of the goods entered into and formed part of the contract of sale. There are two other English cases belonging to the same class. The first is that of *Cannan v. Bryce*, 3 Barn. & Ald. 179. The defendant had lent money to a firm, which afterward became bankrupt, for the purpose of paying a balance due upon certain illegal stock-jobbing transactions, and which had been applied to that object. He having afterward received money belonging to the bankrupts, the assignees brought their action to recover those moneys, and it was held that the defendant could not set off his demand for the money loaned. The other case is that of *McKinnell v. Robinson*, 3 Mees. & Wels. 434 which was an action of assumpsit for money lent. The defendant pleaded that the money was lent in a certain common gambling room, for the purpose of defendants' illegally playing and gaming therewith; and on demurrer the plea was held good. In each of these cases it will be seen that the illegal use was the express object for which the money was lent, and this is relied upon by the court, in both cases, in giving their judgment. In the case of *Cannan v. Bryce*, ABBOTT, C. J., says: 'It will be recollected that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object;' and in the case of *McKinnell v. Robinson*, Lord ABINGER, in stating the principle by which the case was governed, says: 'This principle is, that the repayment of money lent for the express purpose of accomplishing an illegal object, cannot be enforced.'"

It is worthy of note that the three cases last referred to present the views respectively of the heads of the three principal English courts, viz., ABBOTT, chief justice of the King's Bench; EYRE, chief justice of the Common Pleas, and ABINGER, chief baron of the Exchequer; and their concurrence in resting their decisions upon the fact that the illegal object was in the contemplation of both parties, and formed a part of the original contract, goes strongly to confirm the doctrine of the cases of *Faikney v. Reynolds*, *Holman v. Johnson*, etc., *supra*. Indeed, the whole current of English authority goes to support

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these cases, with the single exception of *Langton et al. v. Hughes*, *supra*. They have also been referred to frequently by the courts in this country as containing sound doctrine. *De Groot v. Van Duzer*, 17 Wend. 170; *Merchants' Bank v. Spalding*, 12 Barb. 302; *Armstrong v. Toler*, 11 Wheat. 258. In the latter case, Chief Justice MARSHALL refers to the case of *Faikney v. Reynous* in the following terms: "The general proposition stated by Lord MANSFIELD, in *Faikney v. Reynous*, that if one person pay the debt of another at his request, an action may be sustained to recover the money, although the original contract was unlawful, goes far in deciding the question now before the court. That the person who paid the money knew it was paid in discharge of a debt not recoverable at law has never been held to alter the case."

"The principles established by this strong array of authorities are in entire accordance with the case of *Talmage v. Pell*, 3 Seld. 328, decided by this court. It was a part of the contract in that case, between the banking company and the commissioners of the State of Ohio, that the bonds should remain in the hands of the agent of the State, to be sold on account of the banking company; and this fact is referred to and relied upon by GARDINER, J., by whom the opinion of the court was delivered. He says: 'I am, for the reasons suggested, of the opinion that this bank had no authority to traffic in stocks as an article of merchandise, or to purchase them for the purpose of selling, as a means of obtaining money to discharge existing liabilities; that as the object of the purchase in this case was known to both parties, and made a part of their contract, the debt for the purchase-money cannot be enforced by the vendors, and that the collateral securities must stand or fall with the principal agreement.' The case contains no intimation whatever that the mere knowledge, by the agents of the State of Ohio, that the banking company purchased the bonds with a view to a resale, would have defeated a recovery. On the contrary, such an inference was carefully guarded against by the learned judge who delivered the opinion, as appears from the extract just given.

"I consider it, therefore, as entirely settled by the authorities to which I have referred, that it is no defense to an action brought to recover the price of goods sold, that the vendor knew that they were bought for an illegal purpose, provided it is not made a part of the contract that they shall be used for that purpose; and provided, also, that the vendor has done nothing in aid or furtherance of the unlawful design.

"The law does not punish a wrongful intent, when nothing is done to carry that intent into effect; much less bare knowledge of such an intent, without any participation in it. Upon the whole, I think it clear, in reason as well as upon authority, that in a case like this, where the sale is not necessarily *per se* a violation of law, unless the unlawful purpose enters into and forms a part of the contract of sale, the vendee cannot set up his own illegal intent in bar of an action for the purchase-money."

An action cannot be maintained for rent of premises knowingly leased for the purpose of prostitution (*Girarday v. Richardson*, 1 Esp. 13); nor, when the landlord was not aware of the purpose at the time of the letting provided he afterward learned it, and might have evicted the lessee, can he recover rent accruing during the period when he willingly allowed such occupancy. *Jennings v. Throgmorton*, Ry. & M. 251.

An action may be maintained against a prostitute for clothes sold her (*Bowry v. Bennett*, 1 Camp. 348); or for washing her clothes (*Lloyd v. Johnson*, 1 B. & P. 840), although the plaintiff may have known the use made of them.

But in *Pearce v. Brooks*, L. R., 1 Ex. 213, the defendant, a prostitute, was sued by coach builders for the use of a brougham. It was found that they knew her to be a prostitute, and supplied the brougham with knowledge that it would be, as in fact it was, used by her as part of her display to attract men, but there was no proof that they expected to be paid out of the earnings of her prostitution. *Held*, that the action could not be maintained. This was founded on *Cannan v. Bryce*, 3 B. & A. 178, and *McKinnell v. Robinson*, 3 M. & W. 64, cases of money lent for gambling. POLLOCK, C. B., said: "If a person lends money, but with a doubt in his mind whether it is to be actually applied to an illegal purpose, it will be a question for the jury whether he meant it to be so applied; but if it were advanced in such a way that it could not possibly be a bribe to an illegal purpose, and afterward it was turned to that use, neither *Cannan v. Bryce* nor any other case decides that his act would be illegal. The case cited rests on the fact that the money was borrowed with the very object of satisfying an illegal purpose." BRAMWELL, B., said: "I think the jury were

entitled to infer, as they did, that it was hired for the purpose of display, that is, for the purpose of enabling the defendant to pursue her calling, and that the plaintiffs knew it. That being made out, my difficulty was whether, though the defendant hired the brougham for that purpose, it could be said that the plaintiffs let it for the same purpose. If a man were to ask for duelling pistols, and say, 'I think I shall fight a duel to-morrow,' might not the seller answer, 'I do not want to know your purpose; I have nothing to do with it; that is your business; mine is to sell the pistols, and I work only to the profit of trade.' No doubt the act would be immoral, but I have felt a doubt whether it would be illegal; and I should still feel it best that the authority of *Cannan v. Bryce* and *McKinnell v. Robinson* concludes the matter. In the latter case the plea does not say that the money was lent on the terms that the borrower should game with it; but only that it was borrowed by the defendant and lent by the plaintiff 'for the purpose of the defendant's illegally playing and gaming therewith.' MARTIN, B., said: "As to the case of *Cannan v. Bryce*, I have a strong impression that it has been questioned to this extent, that if money is lent, the lender merely handing it over into the absolute control of the borrower, although he may have reason to suppose that it may be employed illegally, he will not be disentitled from recovering."

In *Pringle v. Corporation of Napanee*, Ont. Q. B., it was held that an agreement to let a hall for the purpose of delivering lectures attacking Christianity is not enforceable.

In *Hill v. Spear*, 50 N. H. 333, where the authorities are very carefully reviewed, the doctrine of *Tracy v. Talmage* is adopted, and that of *Lightfoot v. Tenant* and *Pearce v. Brooks* disapproved. Of the latter the court say: "So a sale of silks and jewels to a prostitute, if it be clearly shown that such sale was made for the express purpose of rendering her person attractive and seductive, and with the view of aiding her unlawful commerce, would be an illegal sale; but shall the seller of such merchandise be disabled from recovery merely because he knows the buyer to be a prostitute? Is such mere knowledge sufficient to render the contract void? We cannot believe that public policy requires the exercise of so much scrutiny into the designs of the purchaser, and the imposition of such restraints upon ordinary traffic, as the rule, so broadly stated in *Pearce v. Brooks*, would seem to imply; and directly contrary to such doctrine are the express decisions in *Bowry v. Bennett*, 1 Camp. 348, *Appleton v. Campbell*, 3 C. & P. 347, and *Hodgson v. Temple*, before cited." They also say, of *Pearce v. Brooks*: "*Cannan v. Bryce* is clearly distinguishable from this, and will not support the latter case; for, says ANNOTT, C. J., in *Cannan v. Bryce*, 'It will be recollected that I am speaking of a case wherein the means were furnished, with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object.' Is there no valid distinction? In *Cannan v. Bryce* the money was loaned for the purpose of enabling the party to engage in illegal stock-jobbing transactions. If the money had simply been loaned to a person who, the lender knew, was engaged in such transactions, and would probably use the money for such purposes, would the contract be invalid? Money loaned to a gambler, for the purpose of being staked upon a pending game, cannot be recovered. Is it the same of money lent to one known to be a gambler, but concerning which loan and the unlawful game there is no other connection between the parties than that which results from a simple borrowing and lending of money?"

In *Cheney v. Duke*, 10 G. & J. 11, the action was to recover the price of a negro slave. There was a statute to prevent the unlawful exportation of such slaves, and the defendant had purchased the slave for the purpose of exporting him. It was held that the seller's knowledge of that purpose would not alone defeat his action for the price, but it must be shown that he was a sharer in the illegal transaction, or aided in its execution, or did something in furtherance of it. This is founded on *Holman v. Johnson* and *Hodgson v. Temple*. This doctrine, the court say, is "abundantly settled."

The same doctrine was held in *McGarvie v. Puryear*, 6 Cold. 35. The action was on a note, and the defense was that the note was discounted for the purpose of enabling the owner to purchase horses, etc., for the use by the Confederate government against the United States. The court said that mere knowledge on the part of the bank of the illegal purpose to which it was intended to apply the money would not defeat a recovery, but that "it must be shown that the bank made the loan with the purpose, on its part, to furnish money to enable the borrowers to do the illegal act."

The same was held in *Green v. Collins*, 3 Cliff. 494, a case of liquors sold in Rhode Island for use in Massachusetts. The court approve *Holman v. Johnson*, *Hodgson v. Temple* and *Tracy v. Talmage*, and distinguish *Langton v. Hughes*, *Cannan v. Bryce* and *Pearce v. Brooks*. In regard to the latter they say: "The act of supplying a female engaged in such criminal practices would warrant a jury in finding that the articles were intended to facilitate the objects of her vocation."

The same was held in the similar case of *Curran v. Downs*, 3 Mo. App. 468; and in *Michael v. Bacon*, 49 Mo. 474, an action to recover for work and materials upon a gambling house. *Pearce v. Brooks* was denied as authority.

The same was held in *Webber v. Donnelly*, 33 Mich. 469, a liquor case, on the authority of *Tracy v. Talmage* and *Hill v. Spear*.

The same was held in *Bishop v. Honey*, 34 Tex. 245, an action for work done on a house of prostitution.

The contrary doctrine was held in *Territt v. Bartlett*, 21 Vt. 184. This was an action for the price of spirituous liquors sold in Vermont but delivered in New York. The plaintiff knew the defendant intended to sell them contrary to the statute. The court disapprove *Hodgson v. Temple*; distinguish *Holman v. Johnson* as involving the infringement of the law only of a foreign State; and approve *Langton v. Hughes*, *Cannan v. Bryce* and *Lightfoot v. Tenant*. There is little examination of the authorities, and the consideration of the principle is brief. But in *Lander v. Seaver*, 32 Id. 114, the doctrine of the principal case was held where the sale was made in New York, and so in *Tuttle v. Holland*, 43 Id. 542.

In *Kannauer v. Doane*, 12 Wall. 342, it was held that an action will not lie for the price of goods sold with knowledge that they were purchased for the Confederate government. This is founded on *Lightfoot v. Tenant*, *Langton v. Hughes* and *Cannan v. Bryce*, and *Armstrong v. Toler* is distinguished on the ground of the difference between *malum prohibitum* and *malum in se*.

In *Adams v. Coulliard*, 102 Mass. 167, the doctrine of *Tuttle v. Holland* and *Lander v. Seaver* was laid down; and it was held that mere reasonable cause of belief, without actual knowledge of the unlawful intent, would not defeat the action.

Mr. Benjamin (Sales, §§ 506-508) says: The sale of a thing in itself an innocent and proper article of commerce is void when the vendor sells it, knowing that it is intended to be used for an immoral and illegal purpose. In some of the earlier cases something more than this mere knowledge was held necessary, and evidence was required of an intention on the vendor's part to aid in the illegal purpose, or profit by the immoral act. The later decisions overrule this doctrine."

He then argues that *Fitchney v. Reynous*, and *Petrie v. Hannay*, 3 T. R. 418, are overruled by *Booth v. Hodgson*, 6 Id. 405, *Aubert v. Maze*, 2 B. & P. 371, *Mitchell v. Cockburne*, 3 H. Bl. 379, *Webb v. Brooks*, 3 Taunt. 6, *Langton v. Hughes*, 1 M. & S. 504, *Cannan v. Bryce*, 3 B. & Ald. 179, *McKinnell v. Robinson*, 3 M. & W. 435, *Pearce v. Brooks*, L. R., 1 Ex. 218, and says, in these cases "the distinction between *malum prohibitum* and *malum in se* is positively repudiated." Of *Hodgson v. Temple* he says: "This decision was given in November, 1813, and is the more remarkable because the case of *Langton v. Hughes* had been decided exactly to the contrary, in the King's Bench, in the month of June, in the same year, and was not noticed by the counsel or the court in *Hodgson v. Temple*."

It should be observed that *Bowry v. Bennett* and *Langton v. Hughes* were both tried before Lord ELLENBOROUGH, who must have thought the cases distinguishable, as indeed they are, for selling clothes to a woman for her personal wearing apparel is very different from selling drugs to a brewer. The clothes might, and must sometimes, have been worn innocently and necessarily; but under the circumstances the brewer could hardly have wanted the drugs for any innocent purpose. So it seems to us that *Pearce v. Brooks* is distinguishable from *Bowry v. Bennett*, for it could hardly be possible that a prostitute, who, as the proof showed, could not read, should need a carriage for any purpose but the ordinary one of aluring her charms to tempt men. But we much prefer the doctrine of the principal case and *Tracy v. Talmage* to that of *Langton v. Hughes* and *Pearce v. Brooks*.

STATE V. MIZNER.

(50 Iowa, 145.)

School — right of teacher to chastise pupil.

A school teacher is not authorized to inflict excessive chastisement ; nor to chastise except for a specific offense which the pupil understands ; nor to chastise a pupil for refusing to study a branch from which his father had excused him.*

CONVICTION of assault and battery. The opinion states the facts.

J. B. B. Baker, A. M. May and F. M. Goodykoontz, for appellant.

J. F. McJunkin, attorney-general, for the State.

SEEVERS, J. This cause was before the court at a former term, and is reported in 45 Iowa, 248 ; s. c., 24 Am. Rep. 769. At the time of the alleged assault the defendant was a teacher of a public school, and the prosecuting witness, Ada Buemer, a pupil therein. She was a month or more over the age of twenty-one years at the time. She resided with her father, and constituted a part of his family. Her father wrote the defendant as follows: "Please excuse Ada afternoons, as her health will not permit her to attend all the time;" and again: "Please excuse Ada from the algebra class, she having more lessons than she can well attend to."

The testimony on the part of the State tended to show the foregoing writings were given to the defendant a few days previous to the assault. The prosecuting witness testified that when she handed one of them to the defendant he asked if she had written it. She replied her father had, and he so testified. The evidence tended to show the defendant declined to excuse her from the algebra class, and she testified she attempted to tell defendant her health would not permit her to take that study, but he interrupted her and said: "I don't want any words from you; I am talking now," and "told me to take my seat and come prepared with the lesson next time. I told him I could not study without help. He

* See *Trustees of Schools v. People ex rel. Van Allen* (37 Ill. 303), 29 Am. Rep. 55

said: 'You can get help, and if you give me any more of your sass I will call you back here.' She replied: "I don't want any more of your impertinence, Mr. Mizner." To which he replied: "That's enough now; that will do." This occurred on Monday. On the next day, Tuesday, the alleged assault and battery was committed.

When school was called that day the defendant asked the prosecutrix to come forward, and she went to where he stood, and the following, according to her testimony, occurred: "He said to me: 'Your excuse?' I said: 'Surely, I was here this morning before school called.' He said: 'Yes, but yesterday afternoon?' I said: 'I have brought an excuse for afternoons.' He said: 'You will fetch an excuse.' I said: 'Don't you remember I brought you an excuse from father excusing me from afternoons this winter.' He said: 'None of your sass, or I will take the hickory to you.' I said: 'Don't strike me.' My reason for making that remark was that he reached for the whip as he spoke. The whip was about six feet long, and was about half an inch in diameter at the largest end. He broke a piece off that end, * * and whipped me with the top part. * * It was not more than four feet long. * * Think he struck me a dozen times * * over my shoulder. * * I felt the blows. * * They produced marks that stayed there two months. * * Think the whip broke to pieces. * * He raised on his tiptoes every time he struck. * * I went to my seat and got my cloak. He said: 'Do you understand me now?' I said: 'No, sir, I do not understand you.' * * I made this remark because I did not know what he whipped me for."

There was other testimony on the part of the State which tended to sustain the prosecutrix.

The testimony on the part of the defendant tended to show that when the algebra class was called, on Monday, the prosecutrix did not come forward, and the defendant said: "Miss Beumer, your class is called." She said she thought she was excused from algebra. He told her she was not; to come to the class. She did so, but took a book in her hand, and said she did not have her lesson. He told her to pay attention to the recitation. She opened the book in her hand. He told her to close it which she did. She opened it again, and turned partly in her seat and commenced turning the leaves. He told her to close the book and keep still, as he did not want to speak to her again. After the recitation closed there was some conversation between them as to the algebra, about

the close of which she told the defendant she did not want any more of his impertinence; to which he replied: "That will do, Miss Beumer; take your seat." She then said: "Yes, that will do."

On Tuesday the witnesses for the defense stated what occurred substantially as those on the part of the State, except that after some talk about the "excuse" the defendant said: "If you don't stop your sass I'll whip you." She replied: "Just try that; you don't dare to strike me. If you do it will be the dearest whipping you ever gave any one; you will pay for it."

The evidence on the part of the defendant also tended to show there were no marks on the person of the prosecutrix, and that the whipping was not immoderate.

Such being the substantial facts there remains for determination the correctness of the instructions of the court, among which was the following:

I. "7. In the absence of all proof the law presumes that a father or school teacher punishes a child of the father or the pupil of the teacher for a reasonable cause and in a moderate and reasonable manner. But this presumption, like all other legal presumptions, may be rebutted by the proof."

It is urged this instruction is erroneous, for the reason the teacher is not liable because of the punishment inflicted, but only in the event that it was excessive, and that the evidence fails to show such was the case.

Forty years ago it was held that "when the correction administered is not in itself immoderate, and therefore, beyond the authority of the teacher, its legality or illegality must depend entirely, we think, on the *quo animo* with which it is administered. Within the sphere of his authority the master is the judge when correction is required, and of the degree of correction; and like all others intrusted with a discretion, he cannot be made penally responsible for error of judgment, but only for wickedness of purpose." *State v. Pendergrass*, 2 Dev. & Batt. 365.

Twenty years later an instruction was refused which announced the rule that a teacher was not amenable criminally unless he inflicted the punishment with a bad intent, from vindictive feelings, and instruction given which recognized the right to chastise a scholar by whipping, and the proof was sufficient to justify the instrument used as being a proper one, but that in "inflicting cor-

poral punishment a teacher must exercise reasonable judgment and discretion as to the mode and severity of punishment, by the nature of the offense and by the age, size and apparent power of endurance of the pupil."

As to this instruction it was said: "The instructions given tended to justify the defendant in punishing his pupils with greater severity than is consistent with a just and humane exercise of the authority conferred on him by law. To say the least, they were sufficiently favorable to the defendant." *Commonwealth v. Randall*, 4 Gray, 36.

We concur with the Supreme Court of Massachusetts in the case last cited, and further than this we have no occasion to go in the present case. But if the rule of the first case cited is the correct one, then we have no hesitation in saying there was no error in the instructions of the court, because the punishment was immoderate and excessive, if the testimony of the witnesses for the State is true, and this was a question for the jury. Any punishment with a rod which leaves marks or welts on the person of the pupil for two months afterward, or much less time, is immoderate and excessive, and the court would have been justified in so instructing the jury.

II. The jury were further instructed: "3. The legal objects and purposes of punishment in school are like the object and purposes of the State in punishing the citizen. They are threefold: *First*, the reformation and the highest good of the pupil; *second*, the enforcement and maintenance of correct discipline in school; and *third*, as an example to like evil-doers. And in no case can the punishment be justifiable unless it is inflicted for some definite offense or offenses which the pupil has committed, and the pupil is given to understand what he or she is being punished for. And if you find from the evidence that the punishment in this case was inflicted upon the prosecutrix without her knowing what she was being punished for, then the punishment was wrongful on the part of the defendant. Punishment inflicted when the reason of it is unknown to the punished is subversive, and not promotive, of the true objects of punishment, and cannot be justified."

The portion of the foregoing objected to is that which declares the punishment must be for some specific offense which the pupil has committed and is given to understand he or she is being punished for.

The object of all punishment must be to accomplish the purposes

specified in the instruction. The definition is an admirable one, and cannot, we think, be improved. If the pupil does not know why the punishment was inflicted reformation cannot be expected therefrom. Just the contrary result might be expected. Counsel mistake the meaning of the instruction. It does not require the teacher to state to the pupil in clear and distinct terms the offense for which he or she is punished. It only requires that the pupil, as a reasonable being, should understand from what occurred for what the punishment is inflicted. There was evidence on which this portion of the instruction could well be based, and all else was for the jury.

Counsel, in their argument, say the punishment was not inflicted because of the prosecutrix's "failure to pursue algebra," or "for not attending afternoon sessions of school," but for insolent and contemptuous conduct. Were it not for this admission we should have been at great loss to determine for what offense the prosecutrix was punished. The particular difficulty which ended in the whipping was in relation to her absence the afternoon previous. The argument is that she was impudent on that occasion; but the evidence on the part of the State shows otherwise, and the most that can be said is that the evidence is conflicting. The question was therefore one for the jury to determine. During both Monday and Tuesday, according to all the evidence, there was language used by the defendant which was unjustifiable, and which tended to show that he permitted himself to get into a passion, which, to say the least, is not commendable; nor can we say that the conduct of the prosecutrix was just what it should have been. Notably was this so on Monday; but there is no pretense that she was punished on Tuesday for insolent conduct on the day previous.

III. The fifth instruction was as follows:

"5. If you find from the evidence that the prosecutrix was in feeble health, and was unable to pursue algebra studies with her other studies, and on account of such feeble health was unable to attend regularly the afternoon sessions of the school; and you further find that for that cause she was excused by her father from the study of algebra and from afternoon sessions of the school; and you further find that defendant had been informed of such facts; then you are instructed as a matter of law that he had not the lawful right to chastise the prosecutrix for failure on her part to pursue such studies, or to attend the afternoon sessions of the school."

It is said there was no evidence showing that the health of the prosecutrix would not permit her to study algebra. If by this is meant there was no positive and direct evidence that such was the case we agree with counsel ; but there was evidence so tending. Her father thought so, and she herself so claimed. This may, for aught we know, have been a sham ; but as there was evidence on the subject it was for the jury to inquire as to its truth. But if, as is conceded by counsel, the prosecutrix was not whipped for failure to attend school in the afternoons, or to study algebra, then, even if it be conceded the instruction is erroneous, it cannot be said to be prejudicial. It was not prejudicial for another reason, which will be presently noticed.

IV. A portion of the sixth instruction is as follows : " The counsel for the defendant admits before you and the court, in argument, that the father may lawfully excuse his minor child from a particular study in the school, if for any reasonable cause the father may believe the good of such minor so requires ; " and the instruction proceeds to lay down the rule that the father of the prosecutrix might under the circumstances do so in the present case, although she was not a minor.

Counsel complain of the portion of the instruction which is quoted ; but if counsel did so state in argument, or concede before the court, we see no objection to the attention of the jury being called thereto. That counsel did so concede must be conclusively presumed, in the absence of any showing to the contrary. If the father may excuse his minor child from a study, or during afternoons, we do not see why he might not the prosecutrix under the circumstances. But if the conceded proposition be true, then either the father could do so or the adult pupil could excuse herself.

Now it is shown that both the pupil and her father desired this. If, therefore, the rules adopted by the teacher required that the prosecutrix should study algebra, and be in attendance during afternoons, and that proper discipline and the good of the school, as a whole, required an enforcement of the rules, we are constrained to think the mode adopted was not the proper one. Compulsory education is not yet the rule in this State, and instead of whipping the prosecutrix for failure to attend or study algebra, when both she and her father desired she should be excused, we think the defendant should have plainly said to both the prosecutrix and her father that she could not attend the school unless she was prepared

to obey the rules in this respect. If a pupil attends school it must be presumed he submits himself to the rules; but that is not this case. Until compulsory education is established we are unwilling to sanction the rule that a teacher may punish a pupil, as in this case, for not doing something the parent has requested the pupil to be excused from doing. The remedy in such case is not corporal punishment, but expulsion.

There is nothing else that demands attention. The instructions refused, so far as they contained the law, were given or properly refused because not the law.

Judgment affirmed.

STATE V. ATHERTON.

(50 Iowa, 189.)

Criminal law — rape — consent — imbecility.

One may be convicted of rape on a woman who failed to resist because of imbecility.*

On an indictment for rape, if consent is shown, there may be a conviction of assault with intent to commit rape, if there was force sufficient to indicate that intent before the consent was given.

INDICTMENT for rape; conviction of assault with intent to commit rape. The opinion states the facts.

Montgomery & Scott, for appellant.

J. F. McJunkin, attorney-general, for the State.

ADAMS, J. The defendant assigns as error the giving of an instruction which is in these words: "The general proposition of law is very distinct and broad that the will of the woman must oppose the act of intercourse with her, and that any inclination by her favoring the same is fatal to the prosecution; but if the female is weak in intellect and foolish, and so neglects to oppose the force because she has no intelligent will sufficient to direct her to resist, then the intercourse with her is rape. If, therefore, you find that

*So when insensible. *Commonwealth v. Burke* (105 Mass. 376), 7 Am. Rep. 531, and note, 535; but as to fraud, *contra*: *Don Moran v. People* (25 Mich. 356), 12 Am. Rep. 263, and note, 290. See *Bloodworth v. State*, post.

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the defendant Atherton laid hold of the witness, Sarah E. Harper, and had unlawful intercourse with her, and you further find that the witness Sarah was then weak in mind and intellect, and had no intelligent will to enable her to know and comprehend what was about to be done by the defendant, and to resist his acts at the time, then the act may be said to have been committed by force and against the will of said Sarah, and under such circumstances the defendant would be guilty as charged."

The fact that the defendant had connection with the prosecuting witness is proven beyond dispute. She not only so testifies, but it is proven by the admissions of the defendant. It appears also that the act was witnessed by a person at no great distance from the parties, and this person was introduced by the defendant himself to prove that he witnessed it. The defendant's object in introducing this witness was to prove that the prosecutrix made no resistance, and the witness so testified. There were also circumstances shown tending to prove that whatever resistance, if any, the prosecutrix made must have been slight. She and the defendant were riding together in a wagon upon a public road, and the transaction took place in the wagon, she occupying a sitting position. Such being the evidence in regard to a want of resistance the State sought to convict on the ground that the prosecutrix was imbecile, and the instruction above quoted was given upon the theory that the jury might find that she was imbecile, and might convict notwithstanding it should appear to them that there was a want of resistance upon her part.

The record contains no evidence tending to show imbecility, nor does it contain any statement that such evidence was introduced. The record, however, does not purport to contain all the evidence, and in such case we will not assume, for the purpose of reversing, that there was no evidence upon which the instruction could be based. *McMillan v. B. & M. R. R. Co.*, 46 Iowa, 231. The instruction, indeed, is not objected to on the ground that there was no evidence tending to show imbecility, but on the ground that if imbecility was proven the defendant was not guilty of rape, and could be indicted and convicted only under section 3863 of the Code. We are inclined to think that if the prosecutrix was so destitute of mind that she was incapable of consent, the defendant was guilty of rape, and might be convicted independent of the section cited. 2 Bish. Crim. Law (5th ed.), § 1121.

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Whether section 3863 of the Code is not intended to provide for the punishment of an offense distinct from that of rape, to-wit: the having carnal knowledge of a woman, not altogether by force, nor because she has no will, but because her will is overcome by reason of her imbecility, which prevents her from fully comprehending not the physical but the moral character of the act, may admit of some doubt; but we do not feel called upon to determine this question in this case. Under the instruction the jury must have found that the connection, which is undisputed, was had with the prosecutrix's intelligent consent. As this is what the defendant sought to show, we do not think, that so far as the instruction is concerned, he has any ground of complaint.

It only remains to be determined whether the jury, after having found that the prosecutrix consented to the connection, and that the defendant was therefore not guilty of rape, could properly find that the defendant was guilty of an assault with an intent to commit rape. There is evidence tending to show that the defendant in the outset used some force, and that the prosecutrix made some resistance. Now the use of force, in an endeavor to have carnal knowledge of a woman, tends to show an intent to commit rape, and such intent may exist consistently with the fact of a subsequent consent. A person, then, may be indicted for rape, and if the conviction for that offense is prevented by reason of evidence of the woman's consent, yet if, before the consent was given, it appears that the defendant used such force as to evince an intention to commit rape, the defendant may be convicted of an assault with an intent to commit rape. *State v. Cross*, 12 Iowa, 66.

Judgment affirmed.

LORING V. SMALL.

(50 Iowa, 271.)

Mechanics' lien — county bridge.

A mechanics' lien will not attach to a county bridge.*

PROCEEDING to enforce a mechanics' lien against a county bridge. The opinion sufficiently discloses the facts. Defendants had judgment below on demurrer.

* To same effect, *McKnight v. Parish of Grant* (30 La. Ann.), 31 Am. Rep.

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Davis & McKenzie and Struble Bros., for appellants.

C. J. C. Ball, for appellee.

DAY, J. The mode of enforcing a mechanics' lien is by suit in the District or Circuit Court, and execution for the sale of the property upon which the lien is established. Code, §§ 2140, 2141 and 2142. The Code contains the following provisions: "Section 3048. Public buildings owned by the State, or any county, city, school district or other municipal corporation, or any other public property which is necessary and proper for carrying out the general purpose for which such corporation is organized, are exempt from execution. * * * 3049. If no property of a municipal corporation, against which execution has issued, can be found, * * * a tax must be levied as early as practicable to pay off the judgment. * * * " The opinion of the Supreme Court of Illinois in *Bouton v. Board of Supervisors of McDonough County*, 84 Ill. 384, is so applicable to every feature of this case that we quote therefrom, and adopt the views therein expressed as our views of this case. In that case it is said: "The further and last ground of claim is that of a mechanics' lien, in the court-house property as sub-contractors. By statute an execution cannot issue against the lands or other property of any county of this State. Revised Statutes, 1845, p. 133. * * * The mechanics' lien law is framed with reference to such property as is subject to be sold under execution. The method which is provided for the enforcement of the lien it gives is by sale upon execution of the property to which the lien attaches for its satisfaction. As to the property which is exempted by law from sale on execution the lien law is incapable of enforcement; and its provisions as respects such are nugatory, and are entirely inapplicable. We hold that the property in question does not come within the purview of the mechanics' lien law, and that no such lien can attach thereto." A like decision in reference to such property was made in *Wilson v. Commissioners of Huntington County*, 7 W. & S. 197. In *Board of Education v. Neidenburger*, 78 Ill. 58, such a lien was held not to attach to a school-house. In that case the court say: "The suggestion is made that the court may in such case apply and carry out the provisions of the lien law so far as to pass a decree for the money due, and stop with that, not ordering any sale of the prop-

erty. But the statute does not contemplate that there shall be any such thing as a personal decree alone. The decree rendered may operate as such, so far as respects any deficiency, after there has been a sale upon execution of the property subject to the lien, and it fails to satisfy the amount found due. The statute, by all its provisions, is only intended to apply and have operation as respects property which may be and is to be sold on execution. We cannot mold the statute to subserve a purpose for which it was never designed." Precisely the same suggestion as was made in the above case is made in the case at bar. The answer to the suggestion above contained is satisfactory and complete. We feel no hesitancy in holding that the property in question in this case cannot be made subject to a mechanics' lien, in view of the statute which exempts it from execution. See, also, *Quinn v. Allen and the Board of School Directors*. 85 Ill. 39.

Judgment affirmed.

SHIRAS V. OLINGER.

(50 Iowa, 571.)

Nuisance — livery-stable.

A livery-stable in a city is not necessarily a nuisance, and so where one has been burned down an injunction will not be granted against rebuilding and using it, but only against its use in a manner proved to have been a nuisance. (*See note, p. 141.*)

SUIT to enjoin the rebuilding and use of a livery-stable, destroyed by fire, in the city of Dubuque. The plaintiff owned and occupied the lot adjoining as a residence. The other facts appear in the opinion. The use was enjoined, but not the rebuilding.

Fouke & Lyon, for appellants.

Shiras, Van Duzee & Henderson, for appellee.

ADAMS, J. Two questions are presented in this case. The first is as to whether the premises as used have been a nuisance; and

second, whether, the use having ceased, an injunction will lie to prevent its being resumed.

I. A livery-stable in a city is not necessarily a nuisance, but may be so under some circumstances. *Burditt v. Swenson*, 17 Tex. 489; *Dargan v. Waddill*, 9 Ired. 244; *Coker v. Berge*, 10 Ga. 336; *Aldrich v. Howard*, 8 R. I. 246. It may doubtless be declared a nuisance if it is built in close proximity to existing residences, and becomes seriously detrimental to the health and comfort of the occupants. In the case at bar the original stable abutted upon the alley, with two doors opening upon it, and within forty feet of the east wall of the plaintiff's house. The stable, if rebuilt as proposed, will occupy the same place, and open upon the alley in the same way. The original alley doors were used for the removal of offal. The alley doors in the rebuilt stable are to be used for the same purpose, necessitating the use of the alley as a temporary place of deposit.

The testimony of members of the plaintiff's family and of other persons living in the immediate vicinity was taken in regard to the odors emanating from the stable. It is not entirely uniform; but in regard to the plaintiff's house it is clearly established that offensive odors were almost constantly perceived within it, and that sometimes they were such as to render it necessary to keep the doors and windows closed upon east and south sides. Expert evidence was introduced to the effect that while it is not clearly established that gases from a livery-stable generate any specific disease, they are regarded by the medical profession as noxious if allowed to permeate residences, increasing exposure to disease, especially in case of epidemics, and constituting generally in disease an aggravating element. Evidence was also introduced showing that sickness in the plaintiff's family and other families near the stable had probably occurred or been aggravated by gases from the stable. On the other hand there was medical evidence tending to show that it has not been observed that persons employed in a livery-stable are more subject to disease than others.

We conclude from the evidence that whatever deleteriousness there may be in gases from a livery-stable, it is not of a very marked character; that persons of out-of-door habits may perhaps be exposed to them with impunity, especially in the absence of any epidemic; but that a residence very greatly permeated by them must be regarded as unwholesome, and to some persons, under some circumstances, likely to prove dangerous.

We are aware of the necessity of livery-stables in cities, and of the difficulty of locating them so far from where persons reside that no one shall feel annoyed by their proximity. They are supposed to depreciate the value of residence property to a much greater distance than the gases can be harmful or possibly penetrate. In the disposition which exists to make war upon them, there is great danger that injustice will be done to their proprietors if they can readily be declared a nuisance. We have accordingly hesitated in coming to the conclusion which we have reached that the use of the defendants' premises for a livery-stable was a nuisance. In so doing it is proper that we should say that the objection to the stable, in our mind, arises largely from the construction of the doors upon the alley so near the plaintiff's residence, the removal of the offal through those doors, and the use of the alley, under the circumstances, as a temporary place of deposit.

II. It is urged, however, that the use of the premises for a livery-stable having ceased, an injunction will not lie to prevent its being resumed. Our attention is called to the case of the *Earl of Ripon v. Hobart*, 3 Myl. & Keene, 177. Lord Chancellor BROUGHAM said that "no instance can be produced of the interposition by injunction in case of an eventual or contingent nuisance." It was held, too in *Flint v. Russell*, a recent case in the Circuit Court of the United States for the Eastern District of Missouri, that the keeping of a livery-stable in a city, not being necessarily a nuisance, no injunction would lie against it in advance. The reason given is that it cannot be determined in advance that it would prove to be a nuisance. This case differs from that in the fact that the effect of the proposed use has been practically demonstrated. It is possible that the premises might be so used as not to be a nuisance. It would indeed be evident that they could, if the fault had been in the mode of keeping them. But the evidence shows that they were well kept. Upon this point a witness testified as follows:

"I have been in the stable almost every day since Olinger kept it; the condition of the stable was first-class · there were not any more smells or stenchens ensuing from it than from any of them."

Other witnesses testified substantially to the same effect. This testimony is undisputed. It may be taken, then, as established that the nuisance has resulted from the location and structure of the building, and mode of using it, rather than from any negligence in keeping it. Unless some change can be introduced more radical

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than would pertain to mere care in keeping it, the use, if resumed as proposed, would, we think, be a nuisance. But inasmuch as a livery-stable is not a nuisance *per se*, and it is not impossible that a change may be introduced which would obviate all objections, we think that the decree enjoining the use absolutely went too far, and should be so modified as simply to enjoin such use as we have found would be a nuisance, to-wit: all use that would be substantially like the use heretofore made of the premises. If we should go further than that, it appears to us that we should be determining in advance of any practical demonstration what would be a nuisance, and that in so doing we should contravene well-recognized legal principles. If a use essentially different should be adopted a new question would arise to be determined upon its own merits.

Modified and affirmed.

NOTE BY THE REPORTER. — To same effect, *Green v. Lake*, 54 Miss. 540; s. c., 28 Am. Rep. 373. In *Dargan v. Waddill*, 9 Ired. L. 244, it is said: "It is true that a stable in a town is not, like a slaughter-house or a sty, necessarily and *prima facie* a nuisance. There must be places in towns for keeping the horses of people living in them, or resorting thither; and if they do not annoy others, they are both harmless and useful erections. But on the contrary, if they be so built, or kept, or so used as to destroy the comfort of persons owning and occupying adjoining premises, and impair their value as places of habitation, stables do thereby become nuisances." "A stable may be likened to a privy, which decency and comfort render indispensable. But the proprietor cannot protect himself under that plea, if by neglecting to cleanse it he allows it to become offensive in the adjacent houses or grounds. So care must be taken to prevent a stable from incommoding the neighbors, from the ordure deposited in it. But if the adjacent proprietor be annoyed by it in any other manner, which could be avoided, it in like manner becomes an actionable nuisance, though in itself a stable be a convenient and lawful erection." In this case, the stable had a wooden floor, the stamping of the horses on which disturbed the neighborhood, and this was held a nuisance, as it might have been paved, or covered with or laid on the earth.

In *Coker v. Birge*, 10 Ga. 336; a livery-stable in a city, within 65 feet of a hotel, was held *prima facie* a nuisance to be enjoined. This was based on the allegations that the proprietor kept a jack in it which he let to mares on the premises, within sight of the guests and family of the inn-keeper, and that he littered the stalls with leaves to increase the manure, and that the stamping of the horses was annoying.

In *Harrison v. Brooks*, 20 Ga. 537, an injunction against the erection of a stable 80 feet from a hotel was denied, on the ground that "Injunctions will only be granted to restrain nuisances, in cases of absolute necessity, in which the evil sought to be prevented is not only probable, but certain and inevitable." This was on bill and answer.

In *Kirkman v. Handy*, 11 Humph. 406, it was held that an injunction would not arise to prevent the erection of a livery-stable in a city. This is on the authority of *Dargan v. Waddill*, *supra*. The court said: "It cannot be denied that a livery-stable in a town, adjacent to buildings occupied as private residences, is under any circumstances a matter of some inconvenience and annoyance; and must more or less affect the comfort of the occupants, as well as diminish the value of the property for the purpose of habitation. But this is equally true of various other erections that might be mentioned, which are indispensable, and which do and must exist in all towns." "The result of our opinion is, that a livery-stable in a town is not necessarily a nuisance in itself; and as it is contingent and remains to be ascertained from future events, whether or not the erection in question will become a nuisance," an injunction against its erection will be denied.

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The same doctrine, as to the nature of a livery-stable, was held in *Burditt v. Succumb*, 17 Tex. 489, on the authority of *Dargan v. Waddill*, and *Kirkman v. Handy*, but an injunction was granted on a verdict that the stable in question destroyed the comfort of the plaintiff, etc. The court said that the defendants' stable was a nuisance "by reason of its locality and construction, as well as the manner of keeping it. According to the testimony of defendants' witnesses it was as well kept as livery-stables generally are. The defendants did not propose to keep it differently; or profess to be able and willing to undertake the keeping of it in any manner which would be less annoying to the plaintiff." "Here the defendants' stable, as kept, is a nuisance, and they do not propose to keep it in any other manner which will be less offensive or injurious. Nor does the evidence warrant the belief, that as it is located and constructed, it will or can be so kept as not to be a nuisance."

To the same effect is *Flint v. Russell*, U. S. Circ. Ct., 8th Circ., DILLON, J., 19 Alb. L. J. 226, where an injunction against erection was denied.

In *Curtis v. Winston*, 38 Vt. 690, it was held that the erection of a private barn in a village, 10 feet from the plaintiff's house, would not be enjoined. In this case some stress was laid on the fact that the plaintiff bought his land and erected his house with notice of the defendant's intention. This was held to defeat his *equitable* remedy.

In *Pickard v. Collins*, 23 Barb. 441, an action of damages for a nuisance caused by the erection of a private stable upon the defendant's land adjoining the plaintiff's dwelling-house, and the allowing of manure and filthy water to accumulate and stand in the cellar. It was held proper for the judge to charge that if the defendant so constructed and adapted the barn, that in its ordinary use it would be injurious and offensive to the plaintiff and cast unwholesome odors in his house, the defendant and his tenants would be liable.

In *Aldrich v. Howard*, 8 R. I. 246, the instructions to a jury having been, that the noises and smells proceeding from a livery-stable, in order to become a nuisance, must create an annoyance to such an extent as to render life uncomfortable in a neighboring house, or to render the house uncomfortable as a dwelling-house, and unfitted for the proper purposes for which it was designed. Held on exceptions, that the charge did not insufficiently nor incorrectly define a nuisance at common law. Also held, that a livery-stable may be a nuisance, notwithstanding it be an admitted fact that it was well and properly built, in a location as unobjectionable as would be any in a town or city, and is properly kept and managed. And evidence tending to show that other stables similarly situated do not create serious annoyance to neighboring householders, may properly be excluded as irrelevant.

The court said: "The charge to the jury is objected to on another ground — that it does not define correctly what constitutes a nuisance at common law. Upon this point, we are referred, for a correct definition of a nuisance, to 2 Selwyn's Nisi Prius, 260, Stephens' Nisi Prius, pp. 2362, 2363. Selwyn says, 'It may be sufficient to observe, that the erection of any thing offensive so near to the house of another as to render it useless and unfit for habitation — as a swine-stye, limekiln, privy, smith's forge or the like — is actionable.' Stephens, p. 2362, uses the same language, referring to the same authorities cited in the text of Selwyn; but he refers also to the case of *Rex v. White*, 1 Burr. 337, as an authority which held, that 'if a person keeps his hogs or other noisome animals so near the house of another that the stench renders the enjoyment of life and property uncomfortable, it is an injurious nuisance, as it tends to deprive him of the use and benefit of his house.' Greenleaf, vol. 2, § 466, says, 'Nuisances to dwelling-houses are all acts done by another, first, without, which render the enjoyment of life within the house uncomfortable, whether by infecting the air with noisome smells, or with gases injurious to health, or by the exercise of a trade by machinery, which produces continued noises in the adjoining tenement.' In *Fish v. Dodge*, 4 Den. 311, the court say, 'It is not necessary, to justify an action that the plaintiff should be driven from his dwelling. It is enough that the enjoyment of life or property is rendered uncomfortable.' Hilliard on Torts, 639, lays down the same rule, that any injury to land or houses which renders them useless or uncomfortable for habitation, is a nuisance, and that offensive odors need not be unwholesome if they render life uncomfortable."

The question in this regard, which the jury were to determine, was expressly stated to

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them to be, whether the erection of the stable and the keeping it for the use for which it was tenanted, created such smells and produced such noises as to render the house uncomfortable as a dwelling-house and unfitted it for the proper purposes for which it was designed; and they were directed, that if it created noises and bad smells to the degree of rendering the house untenable and uncomfortable, loaded it with vermin in that degree which has been described, they would say it was a nuisance. If these smells and noises were so great as to render life disagreeable to the extent set forth in the declaration, the plaintiff might recover damages for a nuisance.

"It is difficult to see how the instructions here materially differ from the law as laid down in the books above referred to. The instructions are, that the noises and the smells, in order to become a nuisance, must create an annoyance to such an extent as to render life uncomfortable, or to render the house uncomfortable as a dwelling-house and unfitted for the proper purposes for which it was designated. The rules thus referred to hold, that it is not necessary that the house should be rendered useless in order to maintain an action, but that it is quite sufficient that the injury should be such as to render the enjoyment of life there uncomfortable. We think, therefore, that for all the purposes of this case, the charge is not open to the objection that it does not sufficiently or correctly define a nuisance at common law.

"Another ground for a new trial is, that the verdict is against the weight of the evidence, as it is against the admissions of the plaintiff that the stable was properly built, that it was properly kept, and in a location as fit as any in that part of the city.

"These admissions, the defendant claims, ought to be sufficient to give him a verdict, and are inconsistent with a verdict for the plaintiff, and are impliedly an admission that there was no nuisance. It has been held, in other cases, that a stable in a town is not necessarily and *per se*, a nuisance; yet if it is so built or so used as that it destroys the comfort of persons owning and occupying adjoining premises, creating such an annoyance as to render life uncomfortable, then it is none the less a nuisance, that it is well kept, carefully built, and as favorably located as the town will admit. The question still is, does it in fact render life uncomfortable? The admissions imply no more than that if care in building and proper careful keeping would have prevented the injurious effects complained of, they would not have resulted from the use of this stable. But the claim of the plaintiff is, that they were insufficient to prevent it, and the question was stated, did this stable injuriously affect the plaintiff's dwelling to the extent alleged?"

PETERSON V. WHITEBREAST COAL AND MINING CO.

(50 Iowa, 673.)

Master and servant — respondeat superior.

A master is not liable for an injury sustained by one of his employees through the negligence of the foreman having charge and control of him and others, unless the foreman had power to discharge employees, or the master was negligent in employing him.

ACTION of damages by employee against employer for negligence. The opinion states the facts. The defendant had judgment below.

J. N. McClanahan, for appellant.

Stuart Bros. & Bartholomew, for appellee.

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SEEVERS, J. It is conceded there is no statute making the defendant liable, but the claim is that a recovery can be had at common law. Nearly twenty years ago it was held in *Sullivan v. M. & M. R. R. Co.*, 11 Iowa, 421, that the principal was not liable for damages sustained by an employee from the negligence of a co-employee in the same general service. This rule as to railway corporations has been changed by statute.

It is insisted, however, that the case above cited is not conclusive as an authority in this, because Watson was boss or foreman having charge and control of the plaintiff and another employee.

It is apparent, however, that Watson was simply an employee engaged in the same general service as the plaintiff. It is true, he had to a limited extent a control of other employees. It does not appear what was the extent of his authority, except such as can be inferred from the terms used in defining it. Certain it is that it is not averred he had authority to discharge other employees, or that the defendant was negligent in employing him.

We have, then, for determination the question whether the defendant is liable for the negligence of a co-employee of a different grade, but who is vested with no authority in the general management of the corporation. It makes no difference if the employee receiving the injury is inferior in grade to the one by whose negligence the injury was caused. *Shearm. & Redf. on Neg.*, § 100. In support of this doctrine many authorities are cited. The same rule is stated in *Law of Negligence*, by Wharton, § 229, where, however, it is said the rule is otherwise when the employer leaves every thing in the hands of an employee, reserving no discretion to himself.

There is no averment in the petition which brings this case within the exception, and no such presumption can be indulged. We are satisfied that the decided weight of authority is in favor of the ruling below.

It is insisted that *Harper v. Ind. & St. L. R. Co.*, 47 Mo. 567; s. c., 4 Am. Rep. 353; *Lalor v. C., B. & Q. R. Co.*, 52 Ill. 401; s. c., 4 Am. Rep. 616; *Fluke v. Boston & Albany R. Co.*, 53 N. Y. 549; s. c., 13 Am. Rep. 545; and *Malone v. Hathaway*, 64 N. Y. 5; s. c., 21 Am. Rep. 573, sustain the position of appellant. Even if this were so, and we were to follow such decisions, the effect would be to overrule *Sullivan v. M. & M. R. R. Co.*, before cited, and this, in view of the legislation on this subject, we should feel un-

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willing to do. But counsel are mistaken as to the rule established in the foregoing decisions. The facts in the two last cases show them to be fairly within the exception above stated. In the other two cases the corporation was held liable, but upon an entirely different principle. Counsel also cite *Kellogg v. Payne*, 21 Iowa, 575; and *Callahan v. B. & M. R. R. Co.*, 23 id. 563. Neither of these cases are applicable to the case in hand.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

**WATERTOWN FIRE INSURANCE CO. v. GROVER & BAKER SEWING
MACHINE COMPANY.**

(41 Mich. 131.)

Insurance — notice of loss — to whom to be given.

Where a policy of fire insurance requires that the insured shall give immediate notice in case of loss, and the loss is made payable to a mortgagee, notice by the mortgagee and the assignee of all the interest of the insured, to the local agent, is valid, if knowledge of it comes to the general agent.*

ASSUMPSIT on a policy of fire insurance. The opinion states the facts. The plaintiff had judgment below.

John D. Conely, for plaintiff in error. An appointee of part of the money under an insurance policy is not a proper person to give notice of loss (*Van Buren v. St. Joseph County Ins. Co.*, 28 Mich. 398); notice should be written (*Cornell v. Milwaukee Ins. Co.*, 18 Wis. 387); the assured, and not an appointee of the money, is the proper party to sue on a policy. *Clay Ins. Co. v. Huron S. & L. Co.*, 31 Mich. 346; *Hartford Ins. Co. v. Davenport*, 37 id. 609.

John C. Patterson and *William H. Brown*, for defendant in error.

MARSTON, J. Counsel for plaintiff in error very properly arranged the questions raised in this case under three heads, and we will follow that arrangement.

* See *Insurance Co. v. Hopé* (58 Ill. 75), 11 Am. Rep. 48.

Watertown Fire Insurance Co. v. Grover & Baker Sewing Machine Company.

I. *The notice.* The provision in the policy requiring notice to be given is as follows : "In case of loss the assured shall give immediate notice, stating the number of the policy and the name of the agent." It was not claimed that any notice whatever was given by Colby, the owner of the premises, and the person to whom the policy was issued. The policy was made payable, in case of loss, to Charles Jagger, as his mortgage interest should appear. James L. Dobbins also had a mortgage on the premises, which will be referred to hereafter, and after the fire an assignment was made to him by Colby of all right, title and interest in and to this policy of insurance over and above Jagger's claims. This assignment was intended by the parties to speak as of a time before the fire. Notice was given by both Jagger and Dobbins to the local agent of the company who issued the policy, which was brought home to the knowledge of at least the general agent or adjuster of the company.

We are of opinion that the notice was sufficient within the letter and spirit of the policy, when given by these parties. No matter what the intention of the parties may have been as to the time the assignment to Dobbins, made after the fire, should be considered as of an earlier date, it could only take effect and operate as at the time of the delivery after the fire, and as an assignment of a money demand against the company. Colby thereupon having no longer any interest in the policy, or the claim thereunder, except as might be applied in payment of his debts, could not, by a neglect or refusal to notify the company of a loss, deprive the mortgagee or the assignee of their rights. They had a direct interest in the matter, and a notice from them would be equally good and available to the company as would a notice from Colby. The mortgagee was one of the parties "assured" within the meaning of the policy, and a notice given by him would inure to the benefit of all other interested parties, and such notice need not be in writing. This notice is distinct from proofs of loss. The whole object is that the company may know that a loss has in fact occurred, so that it might take such action as it considered proper to protect its interests.

[Omitting other points.]

Judgment affirmed.

PENNOCK V. FULLER.

(41 Mich. 153.)

Statute — "office or professional employment" — real estate agent.

A real estate agent is not within a statute imposing a liability for "misconduct or neglect in office or in some professional employment."

CERTIORARI to review proceedings on *habeas corpus*. The opinion states the facts. The defendant was discharged below.

Millard & Bean, for plaintiff in *certiorari*.

Dickerman & St. John, for defendant in *certiorari*.

CAMPBELL, C. J. Pennock sued out a *capias* against Fuller and one Janes, on which Fuller was arrested and released on *habeas corpus*. *Certiorari* is now brought to review the proceedings whereby he was discharged.

The affidavit on which the writ issued was made under § 5734 of the Compiled Laws. The only ground which was invoked under that section was that defendants were guilty of "some misconduct or neglect in office, or in some professional employment," and that the contract liability was thus incurred or complicated. This is the section on which plaintiff's counsel rely.

The affidavit sets up the liability substantially as follows: That the defendants were "copartners in the business of real estate agents," and as agents of plaintiff received the proceeds of land which they sold for him, which, though requested, they have not paid him; that they received it in November, 1877, but concealed the fact and represented by their letters that they had not received it, but that afterward, in the spring of 1878, he called at their office, and they admitted they had received the money, and they or one of them showed him an entry of it on their books.

This case cannot, in our opinion, be distinguished in principle from *Bronson v. Newberry*, 2 Doug. (Mich.) 38, and *People v. McAllister*, 19 Mich. 215. The statute in regard to issuing writs of *capias* divides them into two classes — those which are for damages other than those arising upon contract express or implied,

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and those arising upon such contract. In both of the cases cited the ground of action was that agents had collected moneys and misappropriated them. And in both cases it was held that a *capias* could not issue unless under conditions applicable to contracts. The counsel for plaintiff in the present case puts his whole right of action under § 5734 of the Compiled Laws, which is expressly confined to actions arising upon contract.

The only clauses of agency which that section covers, relate to misconduct or neglect in office, or in professional employment. It was held in both the cases named that a private agency is not either office or professional employment. Professional employment can only relate to some of those occupations universally classed as professions, the general duties and character of which courts must be expected to understand judicially. Real estate agencies are no more professions than any other business agencies. A commission merchant, or an agent for the sale of any particular kind of personal property acts in an analogous capacity. Any one can assume and lay down such business at pleasure, and any one can conduct it in his own way on such terms and conditions as he sees fit to adopt. There is nothing in our laws which would enable any court to draw a line between such business agencies. They are not classed as professions by popular usage or by law. So far as civil remedies are concerned they are not distinguishable, and a suit by *capias* is a civil remedy.

We do not think it necessary to consider the other questions presented, as the commissioner was right in discharging the defendant. The order must be affirmed with costs.

The other justices concurred.

Order affirmed.

 GALLERY V. NATIONAL EXCHANGE BANK OF ALBION.

(41 Mich. 100.)

Corporation — director — powers of.

A note was made by the directors of one corporation, as individuals, and transferred to another corporation, one of the makers being payee and indorser, and president of both corporations. *Held*, that he could not consent for the creditor to any arrangement releasing or impairing the individual liability of himself or his co-directors.

ACTION on a promissory note. The opinion states the facts. The plaintiff had judgment below.

Crane & Montgomery, for plaintiff in error, cited *Merch. Nat. Bank v. Mears*, Thompson's Nat. Bank Cases, 353; *First Nat. Bank v. Nat. Exch. Bank*, id. 124; *Porter v. Bank of Rutland*, 19 Vt. 410.

Rienzi Loud, for defendant in error.

MARSTON, J. The National Exchange Bank commenced an action of assumpsit to recover a balance claimed to be due on a promissory note made by Gallery and nine others, payable to the order of Samuel V. Irwin and indorsed by the latter.

The makers of this note were all directors of the Northern Central Mich. R. R. Co. at the date thereof. Samuel V. Irwin, one of the makers and the payee therein named, was president of the railroad company at the time the note was given, and was also at the same time and continued to be president of said bank. Irwin kept his office at the bank and gave its business and loan department his personal attention.

No question was made as to the proper transfer of this note to the bank for value before maturity.

None of the makers of this note received any consideration therefor. It was given, in part at least, in renewal of other like notes, and the money obtained therefrom was to be and was used solely for railroad purposes.

Evidence was introduced tending to prove that this note, and those in renewal of which it was given, were not to be paid by the makers thereof, but only from the assets or funds of the railroad company when collected; also that after this note was given an agreement was entered into in August or September, 1871, by and between the makers thereof, acting as directors of the railroad company, that a certain contract should be entered into with one Smith in reference to the construction of the railroad; that at the same time [Brockway] one of the directors and makers of this note, in consideration of the execution of such contract with Smith, agreed to take certain subscriptions and notes received by these directors to aid in the construction of the railway, and prepare the road-bed, pay this note and release his co-makers from all liability or responsibility thereon, which offer was accepted and a large amount of

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subscription notes turned over for Brockway's and the railroad company's benefit, amongst which was a note for \$500 given by defendant Gallery which he turned over with the other railroad notes then in his possession. At the time this agreement was made Irwin was present, and it is claimed assented thereto.

Evidence was also given tending to show that some understanding existed under which the makers of this note should only be held liable, each for one-tenth the amount thereof, and that several of them had paid their full proportion thereof.

After the evidence was all introduced, the court on motion struck out all that had been introduced on the part of defendants, and submitted to the jury the question as to how much remained due and unpaid upon this note.

The evidence offered and received to prove an agreement made between the makers of this note, that they should not be personally liable in accordance with the terms thereof, and that it should be paid only out of assets of a corporation of which they were directors, was clearly incompetent. This is too clear to admit of question. The note was given to the corporation and the makers could not thus pay their own note from the funds of their creditor. The benefit to the corporation from such a course is not apparent.

It is equally clear that the promise of Brockway made in September, 1871, to pay this note, and release the makers thereof from all responsibility, could in no way affect or lessen their liability to the bank. All such agreements require the consent of the creditor, and where this is wanting the obligation remains. The only ground upon which it is claimed the bank could be bound or affected by such an agreement was placed upon the fact that Mr. Irwin, the president, who it was claimed was superintendent and manager of the bank, was present, and consented to the arrangement.

Mr. Irwin was one of the makers and also an indorser upon this note. If the agreement made was valid and binding upon the bank, then he also was released from all liability thereon. Mr. Irwin was not acting at the time of this agreement, nor was he present as president of the bank, representing and looking out for its interests, but acting as president and a director of the railroad company. Even however had he assumed to act for and represent the bank, being liable as maker and indorser, he could not consent to his own release and that of his co-makers, and bind the bank thereby. It would be for his private interests to accept of the

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agreement of Brockway, and thus, if it were valid, be released from all liability thereon. As president of the bank it would have been his duty to reject Brockway's proposition so that the security which the bank had, should not be impaired by the release of any of the makers. That he could not act in such a double and antagonistic capacity is well settled in this State. *Stevenson v. Bay City*, 26 Mich. 46.

Even if we concede that an agreement such as is claimed was made, yet we do not see how the interests of the bank could be affected thereby. It might admit of some question whether Brockway's agreement to thus pay the debt of others would be valid under the statute of frauds. Even if the proper officers of the bank had been present and acquiesced in what was done, yet it is not claimed that the effect thereof could have been to discharge the makers and accept Brockway in lieu thereof. The bank was not a party to this arrangement at all, and if knowledge of this agreement was shown to have been brought home to the bank, which we think was not the case here, and that the bank silently acquiesced therein, the result would in no way be changed.

The position which counsel for plaintiff in error insist upon in this case was passed upon in *Lewis v. Westover*, 29 Mich. 14, where the facts made a much stronger case than we have here, and yet it was held the indorser of the note was not discharged.

The judgment must be affirmed, with costs.

The other justices concurred.

Judgment affirmed.

SPICER V. EARL.

(41 Mich. 191.)

Infancy — repudiation — executed contract for services.

An infant cannot repudiate his executed contract to render services at a stipulated price, and recover *quantum meruit*, where the other party did not know of his infancy, and the contract was reasonable. (*See note, p. 155.*)

ACTION for services. The opinion states the facts. The plaintiff had judgment below.

Spicer v. Earl.

I. H. & John M. Corbin, for plaintiff in error.

Wood & Kenney and E. A. Foote, for defendant in error.

COOLEY, J. Earl sued Spicer to recover for services as a miller. The services commenced July 5, 1877, and continued until May 14, 1878. Earl claims to have been an infant until March 8, 1878. He however made the contract of service on his own behalf, and it does not appear that Spicer knew he was under age. When Earl left the service of Spicer in May, the parties attempted to settle, but failed. Earl claimed that the contract between the parties had been that he was to be paid one dollar a day for his services, and to have his board. Spicer admitted that this was the first arrangement, but claimed that it had been subsequently changed and the wages reduced. Earl had had his board for the whole period, and some payments in money, and there is nothing in the record to indicate that he had at any time repudiated the contract as he understood it. On the contrary, he seems to have continued to work under it for more than two months after he came of age, and only dissented from it after the failure to settle. He then brought suit on a *quantum meruit*.

The Circuit judge instructed the jury that if the plaintiff was an infant when he made the contract of service, he was not bound by it, and could collect the value of his services for the time he worked, unless he had affirmed it after coming of age; and he submitted it to the jury to determine whether any thing had been done by him after coming of age by way of affirming or ratifying. The verdict indicates that the jury gave the plaintiff what they believed was the value of his services, and disregarded the contract.

The principle laid down in the case of *Squier v. Hydliff*, 9 Mich. 274, governs this case. It was there held that an infant was bound by his executed contract of service if it was reasonable under all the circumstances, or not so unreasonable as to be evidence of fraud or undue advantage. It is true the contract in that case was one for necessities exclusively, and this was for necessities only to the extent of the board; but the fact that something more was to be paid to the infant is not very important. Family servants and many others are commonly employed on the same terms as was this infant. It would be absurd as well as mis-

chievous that the right to disaffirm should depend on the circumstance that the employer was to pay something besides the servant's support. It was well said by Justice CHRISTIANCY in the case mentioned that "it is essential to the protection of infants that they should be bound by contracts of this kind after they have been executed; and this idea of protection lies at the basis of the whole law of infancy. Should the law recognize the right of repudiation in such cases, no man could furnish an infant with the necessaries of life in compensation for his services without the risk of a lawsuit; and the minor, though able and willing to earn his support, would often be deprived of the opportunity, and driven perhaps to vagrancy and crime."

No better illustration of the truth of what is here said can be had than this case presents. This infant was upwards of twenty years of age when he hired out his services, and there is no pretense that he did not understand the current wages, or act with entire independence in making his bargain. There is no reason to suppose he was overreached. If the employer testifies to the truth, his business was entirely unremunerative, and the employment was more likely a favor to the employed than to the master. Had the latter understood that he was subject to the liability, after the labor had been performed, to be called upon to pay for it any price that might be made out on the judgment of others, he would have refused to employ the infant at all; and the latter would have gone without employment — or at least without wages — because any one who should promise him more than the necessaries of life might be compelled to pay an indefinite price to be fixed afterward by a jury, with costs in addition. Prudent men would not give employment under such circumstances, especially at a time when labor is not at all in demand, and when employment at any thing more than one's board is often a matter of kindness and favor. Such a time has been within the experience of many persons within the last five or six years.

It is a harsh rule which permits the infant to repudiate his contract after he has executed it, where no advantage has been taken of him, and where the party dealing with him was not aware of his infancy. Where only the infant's services are in question, the rule should not be extended beyond what is absolutely necessary to proper protection; it should not be allowed to become a trap for others, by means of which the infant may

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perpetrate frauds. If a contract for service is apparently fair and reasonable under the circumstances, the infant who has performed it should be held to its terms, and if he attempts to repudiate it, the attention of the jury should be directed to the question whether or not an unfair advantage has been taken of him, instead of their being required to find a subsequent affirmance. So long as the employer who is acting in good faith is not notified of any dissent, he has a right to understand that his responsibility is measured by his agreement. On the other hand, the infant may abandon the service when he pleases, or stipulate for any new terms he may see fit to demand and can procure assent to. He is bound by the terms of the contract so far as he executes it without dissent, but no further. But we have no hesitation in saying that if evidence of affirmance of the contract were required, the jury ought to have found it in this case in the fact of the service being continued without demand for increased wages after the infant came of age.

Whether the wages were reduced or not by the action of the parties is a question on which they disagreed, and which must go as a disputed fact to another jury. Spicer testified that he found he could not afford to pay wages as originally agreed, and notified Earl that if he continued in his employ he should pay thereafter only ten dollars a month, and that Earl continued to work for him without notifying him that he should claim more. If the jury should find this to be the fact, it would constitute a new arrangement, and the recovery should be limited accordingly.

The judgment must be reversed with costs, and a new trial ordered.

The other justices concurred.

Judgment reversed.

NOTE BY THE REPORTER.—The doctrine of the principal case was held in *Stone v. Dennison*, 13 Pick. 1. That was a case where the infant was paid for his services by food, clothing, and education, and therefore comes within the rule of contracts for necessities. The court however said, "He may make contracts which are beneficial to him." Such was the case in *Squire v. Hydliff*, 9 Mich. 274. So, also, in *Breed v. Judd*, 1 Gray, 455, where an infant, in consideration of an outfit to go to California, agreed to give one-third of the avails of his labors during his absence, and did so, it was held that he could not recover the amount so sent, less the expense of the outfit. The court said: "Indeed, to say that an infant could make no contract for his labor, however reasonable and beneficial to himself, by which he should be bound, even when fully executed on both sides, instead of serving as a protection to the infant, would have the effect only to prevent his being employed. Men of business want to know before hand what they have got to pay, and also to know that when an agreement for labor, reasonable and just, has been justly made and fully executed, and the price paid, there is an end of the matter." In this case the court saw the way to this hold-

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ing irrespective of the doctrine of necessities, having some doubt whether the articles were necessities.

In *Wood v. Fenwick*, 10 M. & W. 204, it was said by ABINGER, C. B., *obiter*, that, "there can be no doubt, that generally speaking, a contract by an infant to receive wages is binding upon him." In *King v. Inhabitants of Wigston*, 3 B. & C. 484, it was held that an infant is bound by his contract of apprenticeship. This doctrine, however, has been denied.

STAMP V. CASE.

(41 Mich. 207.)

Assignment for benefit of creditors — delivery to agent of assignee — acceptance.

A storekeeper in Marcellus executed an assignment for the benefit of creditors to a creditor residing at Detroit, who had previously promised to settle up his business if he had to suspend. The assignor delivered the assignment to an agent of the assignee, who, leaving the assignor in possession, notified his principal by telegraph, and next day delivered the assignment to him at Detroit, and he indorsed his acceptance, and set out to take possession. On the previous day, after the execution of the assignment, another creditor levied an attachment on the goods. *Held*, that the attachment must yield to the assignment.*

TROVER. The opinion states the case. The plaintiff had judgment below.

Howell & Carr, Meddaugh & Driggs and Henry Swan, for plaintiff in error. The operation of an assignment depends upon its acceptance as well as its delivery. *Pierson v. Manning*, 2 Mich. 461; *Crosby v. Hillyer*, 24 Wend. 280; *Lawrence v. Davis*, 3 McLean, 178; *Halsey v. Whitney*, 4 Mass. 215; *Wheeler v. Sumner*, id. 183; *Burrill on Assignments*, 280. And if a levy is made upon the goods before actual acceptance, it is a prior lien. *Johnson v. Farley*, 45 N. H. 509; *Welch v. Sackett*, 12 Wis. 243; 21 id. 676; *Samson v. Thornton*, 3 Metc. 281; *Com. v. Thompson*, 10 Bush, 427; *Day v. Griffith*, 15 Iowa, 106; *Bell v. Farmers' Bank*, 11 Bush, 39; *Goodsell v. Stinson*, 7 Blackf. 439; *Hulick v. Scovil*, 4 Gilm. 190. The doctrine that delivery to a third person for the grantee's benefit is delivery to the grantee (*Hosley v. Holmes*, 27 Mich. 416) cannot be so applied as to work injustice to the rights of innocent parties

* To same effect, *Johnson v. Sharp* (31 Ohio St. 611), 27 Am. Rep. 888.

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acquired before the grantee receives the grant. *Frost v. Beekman*, 1 Johns. Ch. 297; *Van Court v. Moore*, 26 Mo. 92; *Parmeles v. Simpson*, 5 Wall. 86; 3 Washb. Real Prop. 309. A delivery is not valid unless it precludes recall by the grantor. *Cook v. Brown*, 34 N. H. 475; *Bank v. Webster*, 44 id. 268; *Brevard v. Neely*, 2 Sneed, 171; *Kelly v. Roberts*, 40 N. Y. 440. Creditors have no right of action against an assignee for their benefit, until a privity of contract arises between them by his acceptance of the trust. *Williams v. Everett*, 14 East, 595; *Harland v. Banks*, 15 A. & E. (N. S.) 717. The consideration passing from an assignee is his undertaking to perform the trust. *Thomas v. Clark*, 65 Me. 296. An assignment does not take effect unless the assignee chooses to accept it. *Miller v. Blinbury*, 21 Wis. 676.

Harsen D. Smith and Norris & Uhl, for defendant in error.

GRAVES, J. This case involves a contest between an assignee for creditors on the one hand, and certain attaching creditors on the other; and the question is, which first took effect—the assignment or the levy of the attachment.

The fairness and good faith of the assignment are not disputed, and no objection is urged against the regularity of the attachment proceedings. The determination depends finally on the answer to this question: Were the acts concerning delivery of the assignment such as to bind the property prior to the attachment levy? The defendant in error claims that they were, and the plaintiff in error that they were not.

The subject was discussed at the bar with much learning and ability, and many authorities were cited. We shall not attempt an examination and comparison of cases. A full and critical review would require much time and space, and a partial examination would not be useful. The view taken is supposed to bring the case within principles generally admitted. There is no controversy about the facts, and their meaning is not doubtful.

November 19, 1878, Nelson J. Huber was engaged in merchandising at Marcellus, in Cass county. He had been so engaged for some time previously. He was in debt to Charles Root & Co., of Detroit, in the sum of \$2,400; to R. & J. Cummings & Co., of Toledo, in the sum of \$1,000; to Johnson & Wheeler, of Detroit, in the sum of \$300; and to Barkman & Thorp, of Three Rivers, in the sum of \$12, and to no others. These debts were all due.

Between two and three o'clock of that day the plaintiff in error, being sheriff of the county, levied an attachment in favor of R. & J. Cummings & Co. on the goods in Huber's store, and found Huber in possession. He informed the sheriff that he had assigned to Case, and was holding for him. Case subsequently brought this action of trover on the sheriff's seizure, and recovered.

We may now turn to matters connected with the giving of the assignment. About two weeks before the attachment, Case, who was one of the firm of Charles Root & Co., met Huber and conversed with him about his affairs. His business embarrassment was talked about, and Case desired that he would consult him in the event of his becoming so pressed that he could not continue, and Huber then made request that he would settle up his matters in case it was found necessary to suspend business, and Case then promised he would do so. He told Huber that "if it became necessary he would settle his business up for him; that he should do nothing without consulting him, and not lose his nerve and give any mortgage to Cummings & Co." An assignment was not in terms mentioned.

Early on the day of the attachment — November 19th — and before its issue, the firm of defendant in error, Charles Root & Co., sent their salesman and agent, Leonard, to Huber at Marcellus to get their debt secured. No instructions seem to have been given concerning the way to be taken or the security to be obtained. The agent was left to act according to his judgment of the circumstances.

Leonard, as representative of the firm of defendant in error, for this purpose requested Huber to give a mortgage. He declined to do that, and proposed to make an assignment for the benefit of all his creditors. Yielding to this suggestion as an offer of security, Leonard then requested that Case should be constituted assignee, and Huber assented. The assignment was then drawn with Case named as assignee. Huber executed it in presence of Leonard and another and acknowledged it. It contemplated that schedules would be attached, but none were supplied until several days afterward. They were not necessary to pass the property. As soon as the instrument was acknowledged, Huber handed it to Leonard, with instructions to take it to Case. Huber took Leonard to the store and showed the property to him, and Leonard thereupon instructed Huber to keep on selling and keep an account of what he

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sold. Both appear to have assumed that the property was subjected to the assignment. Leonard left immediately for Detroit, and on reaching Decatur, a few miles from Marcellus, informed his principals, the firm of defendant in error, by telegraph, that Huber had assigned to Case.

He reached Detroit the next morning, November 20th, and went to the store of the firm. Case had been up the river and returned about noon of that day. Leonard at once handed the assignment to him and told him of his appointment, and he, without any delay or hesitation, assumed the trust and proceeded to Marcellus on the first train to carry it out. He took the precaution to subscribe an acceptance on the instrument. One of the reasons for his acceptance of the trust was his previous promise to Huber. Leonard states that he did not assume to act as Case's agent in taking the assignment, and did not assume to accept for him; that he acted for the firm.

The preparation of the assignment, and the execution and giving of it into Leonard's hands, and his departure for Detroit, preceded the levy of the attachment between two and three hours, and the arrangement between Huber and Case to meet the contingency of Huber's being unable to go on, occurred between two and three weeks earlier.

In the opinion of the court it results from these facts that the assignment took effect as soon at least as the time when Leonard proceeded with it to Detroit. Huber had parted with the possession and control of it; had placed it unconditionally in Leonard's hands, to be immediately subject to Case's disposal, and with the design that it should pass the property presently. There was no qualification and no reserve. The actual transit of the paper from Huber to Case might occupy a few moments or a few hours, but as the symbol of conveyance it had gone beyond Huber's control. As Leonard represented the firm he represented the entire membership of the firm, and through him the firm and its membership also sanctioned what was done. Case was a member, and as such his sanction was given, and as such he was interested in having the assignment executed, and interested, presumably, in having it executed by himself. At the same time he was the firm nominee to execute it, and in view of the previous understanding between himself and Huber we think he was in effect self-nominated. The fair import of that understanding was,

we think, that in case there should be occasion, he would act as assignee, and the proper sense of it was equivalent to an assent in advance. It was not necessary that an assignment should be mentioned in terms. The understanding manifestly referred to that kind of extremity in which an assignment is usually resorted to for the purpose of settling matters, and plainly contemplated the acceptance of that position by Case which he would naturally have to take to settle up business in the ordinary course, namely, the position of assignee. When Leonard started for Detroit with the instrument it was in his hands with the concurrence of Huber, and of the creditor firm of Charles Root & Co. and of the trustee Case, in his character of member of that firm and in his individual character, and in order that it might have operation and be fully executed.

According to this view the jury were justified in finding that the assignment took effect before the levy, and the judgment should be affirmed, with costs.

Judgment affirmed.

CAMPBELL, C. J., and MARSTON, J., concurred.

COOLEY, J. I concur in the result.

HIGGINS V. KUSTERER.

(41 Mich. 318.)

Real property — ice in pond, not.

A sale of ice already formed in a pond is a valid sale of personal property.
(See note, p. 164.)

ACTION for price of ice. The opinion states the facts. The plaintiff had judgment below.

Ballard & Maynard, for plaintiff.

Charles J. Potter and Turner & Smith, for defendant. Land comprises any ground, soil or earth whatsoever, as arable, meadows, pastures, woods, moors, waters, marshes, furzes and heath (1 Co. Inst. 4), and every thing under and over the earth, as mines and

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houses (2 Bl. Com. 18); the owner of land has a mere usufruct right and no absolute property in water flowing over it (Washb. Easements, 286-7), though he has in water in ponds, wells, springs, cisterns, etc. (id. 280, 321); aquatic rights enjoyed by those who do not own the soil are easements (id. 4; 3 Kent's Com. 427); the right to water in wells and cisterns is an interest in lands or a right to profit *a prendre* (*Hill v. Lord*, 48 Me. 100; see Wash. on Easements, 12; *Manning v. Wasdale*, 5 A. & E. 758; *Race v. Ward*, 4 El. & B. 702); ice when formed is an accession to the soil and part of the realty (*State v. Pottmeyer*, 33 Ind. 402; s. c., 5 Am. Rep. 224; 30 Ind. 287); a contract for ice at so much a ton or cake would be good, as it would be a sale of personalty (*Smith v. Surman*, 9 B. & C. 561; Benj. on Sales, §§ 118-126, n. y); a right to take a profit in the soil goes with the right to enter on another's land to cut grass (Vin. Ab., tit. Prescription); for pasturage (Cro. Eliz. 180, 363); hunting and taking away the game (*Pickering v. Noyes*, 4 B. & C. 639; *Wickham v. Hawker*, 7 M. & W. 63); fishing (*Waters v. Lilley*, 4 Pick. 145; Washb. on Easements, 531); taking away sand drifted on to the beach (*Blewett v. Tregonning*, 3 Ad. & El. 554; *Perley v. Langley*, 7 N. H. 233); taking sea-weed (*Hill v. Lord*, 48 Me. 100); piling wood and lumber (*Littlefield v. Maxwell*, 31 Me. 134); a right to seek, mine and dispose of metals in the grantor's land, is an incorporeal right (*Doe v. Wood*, 2 B. & Ald. 724); a right to take coals is incorporeal and cannot be created except by grant or prescription (*Huff v. McCauley*, 53 Penn. St. 206); a sale of standing timber to be cut by the purchaser conveys an interest in land within the meaning of the statute of frauds (*Russell v. Myers*, 32 Mich. 522; *Green v. Armstrong*, 1 Den. 550; *Buck v. Pickwell*, 27 Vt. 157; *Harrell v. Miller*, 35 Miss. 700; *Giles v. Simonds*, 15 Gray, 444; *Whitmarsh v. Walker*, 1 Metc. 316; *White v. Foster*, 102 Mass. 375; *Poor v. Oakman*, 104 id. 316; *Howe v. Batchelder*, 49 N. H. 204; *Kingsley v. Holbrook*, 45 N. H. 313; *Owens v. Lewis*, 46 Ind. 488; *Bank of Lansingburgh v. Crary*, 1 Barb. 543; *Warren v. Leland*, 2 id. 613; *Pierrepont v. Barnard*, 5 id. 371; *Silvernail v. Cole*, 12 id. 685; *Bennett v. Scutt*, 18 id. 347; *McGregor v. Brown*, 10 N. Y. 118; *Killmore v. Howlett*, 48 id. 569; *Slocum v. Seymour*, 36 N. J. 138); sea-weed cast up by the waves is an accession, and belongs to the owner of the land (*Emans v. Turnbull*, 2 Johns. 313; 3 Am. Dec. 427; *Phillips v. Rhodes*, 7 Metc. 323); *fructus industriales* go to the executor, but material products to the heir (*Evans v. Roberts*, 5 B. &

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C. 83d; Benj. on Sales, §§ 120-127); the fish in the fish pond belong to the heir (Owen, 20); sales of growing grass are within the statute of frauds (*Crosby v. Wadsworth*, 6 East, 602; *Waddington v. Bristol*, 2 B. & P. 452; *Washbourn v. Burrows*, 1 Ex. 107; *Carlington v. Roots*, 2 M. & W. 248); and fruits on trees (*Rodwell v. Phillips*, 9 M. & W. 502); and standing underwood (*Scorell v. Beall*, 1 Younge & J. 396); and growing poles (*Teal v. Auty*, 2 Brod. & Bing. 101); a grant of uncut ice is more than a license to remove it. *Wood v. Leadbitter*, 13 M. & W. 838.

CAMPBELL, C. J. Higgins recovered below a judgment against Kusterer for the value of a quantity of ice. Kusterer claims that title never passed to Higgins, and that the property was lawfully acquired by himself from one Loder, who cut it on a pond belonging to one Coats and sold it to defendant.

The facts are briefly these: The ice in question was formed upon water which had spread over a spot of low ground partly belonging to Hendrick Coats, forming a basin, the land being dry in summer, and the rest of the year overflowed from a small brook leading into it. After the ice formed, and in February, 1878, Coats by a parol bargain sold all the ice in his part of the basin to Higgins for fifty cents. The parties at the time stood near by in view of the ice, and the quantity sold was pointed out, and the money paid. The ice was then all uncut.

About two weeks thereafter John Loder, knowing that Higgins had purchased and claimed the ice, and having been warned thereof by Coats, offered Coats five dollars for the ice, which Coats accepted, and Loder cut it, and sold it to Kusterer who had made a previous verbal contract with Loder for it. Higgins was present when the ice was loaded on Kusterer's sleigh and forbade the loading and removal on the ground that he had purchased it from Coats. Kusterer referred the matter to Coats who said he had sold it to Loder.

The only question presented is whether Higgins was owner of the ice.

The case was argued very ably and very fully, and the whole subject of the nature of ice as property was discussed in all its bearings. We do not, however, propose to consider any question not arising in the case.

The record is free from any complications which might arise un-

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der other circumstances. There are no conflicting purchasers in good faith without notice. Loder and Kusterer had full notice of the claims of Higgins before they expended any money. The sale to Higgins was not a sale of such ice as might from time to time be formed on the pond, but of ice which was there already, and which if not cut would disappear with the coming of mild weather and have no further existence. It was not like crops of fruit connected with the soil by roots or trees through which they gained nourishment before maturity. It was only the product of running water, a portion of which became fixed by freezing, and if not removed in that condition would lose its identity by melting. In its frozen condition it drew nothing from the land, and got no more support from it than a log floating on the water would have had.

Its only value consisted in its disposable quality as capable of removal from the water while solid, and of storage where it might be kept in its solid state, which could not be preserved without such removal. If left where it was formed it would disappear entirely.

While we think there can be no doubt that the original title to ice must be in the possessor of the water where it is formed, and while it would pass with that possession, yet it seems absurd to hold that a product which can have no use or value except as it is taken away from the water, and which may at any time be removed from the freehold by the moving of the water, or lose existence entirely by melting, should be classed as realty instead of personalty when the owner of the freehold chooses to sell it by itself. When once severed no skill can join it again to the realty. It has no more organic connection with the estate than any thing else has that floats upon the water. Any breakage may sweep it down the stream and thus cut off the property of the freeholder. It has less permanence than any crop that is raised upon the land, and its detention in any particular spot is liable to be broken by many accidents. It must be gathered while fixed in place or not at all, and can only be kept in existence by cold weather. In the present case, the peculiar situation of the pond rendered it likely that the ice could not float away until nearly destroyed, but it could not be preserved from the other risks and incidents of its precarious existence. Any storm or shock might in a moment convert it into floating masses which no ingenuity of black-letter metaphysics could annex to the freehold.

It does not seem to us that it would be profitable to attempt to determine such a case as the present by applying the inconsistent and sometimes almost whimsical rules that have been devised concerning the legal character of crops and emblements. Ice has not been much dealt with as property until very modern times, and no settled body of legal rules has been agreed upon concerning it. So far as the principles of the common law go, they usually if not universally treated nothing movable as realty unless either permanently or organically connected with the land. The tendency of modern authority, especially in regard to fixtures, has been to treat such property according to its purposes and uses as far as possible.

The ephemeral character of ice renders it incapable of any permanent or beneficial use as part of the soil, and it is only valuable when removed from its original place. Its connection — if its position in the water can be called a connection — is neither organic nor lasting. Its removal or disappearance can take nothing from the land. It can only be used and sold as personalty, and its only use tends to its immediate destruction. We think that it should be dealt with in law according to its uses in fact, and that any sale of ice ready formed, as a distinct commodity, should be held a sale of personalty, whether in the water or out the water.

We shall not attempt to discuss cases where the bargain includes future uses of land and water, and interests in ice not yet frozen. Whether such dealings are to be regarded as leases or licenses, or executory sales, may be properly discussed when they occur. We think the sale in the present case was rightly held to be a sale of personalty.

The judgment must be affirmed, with costs. .

Judgment affirmed.

The other justices concurred.

NOTE BY THE REPORTER — In *State v. Pottemeyer*, 33 Ind. 402; a. c., 5 Am. Rep. 224, it was held that under a statute making it indictable to remove, without license, from the lands of another, "any tree, stone, timber or other valuable article," ice formed in a stream not navigable was part of the realty, and a "valuable article."

Ice packed in an ice-house is the subject of larceny (*Ward v. People*, 6 Hill, 144); the court remark that it is not individual property, so as to make it the subject of larceny, "when it constituted a part of the river or pond from whence it was originally taken."

Prine v. Woods, 103 Mass. 160, was an action of damages for flowing lands, and defendant contended that the flowing was a benefit in enabling the plaintiff to harvest ice formed thereon in consequence. On this the court say:

"The right of cutting and taking ice, either for use or for sale, from a great pond which is one of the public waters of the Commonwealth, is a public right, which may be exercised by any citizen who can obtain access to the pond without trespassing upon the lands

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of other persons, and who does not, by his exercise of the right, unreasonably interfere with its similar exercise by others. *West Roxbury v. Stoddard*, 7 Allen, 158.

"But the ice formed in water over the land of a private proprietor, and not within the natural limits of a great pond, may, like the water in which it is formed, be taken and carried away by him, unless others have acquired paramount rights in it by agreement with him or by authority of law.

"The owner of a mill-dam does not, by proceedings under the mill act, acquire any title in the land flowed, or in the water itself, but a mere right to raise the water by his dam. The owner of the land thereby flowed must not indeed draw off by canals, aqueducts or ditches, the water which has been raised by the dam. *Cook v. Hull*, 8 Pick. 299; *Storm v. Manchaug Co.*, 13 Allen, 10. But he may use it for watering his cattle, or irrigating his crops and gardens, or any other reasonable purpose which does not practically and in a perceptible and substantial degree impair the right to run the mill; and so he may take and carry away the water when formed into ice, for use or sale, provided he does not thereby appreciably diminish the head of water at the dam of the mill-owner. *Cummings v. Barrett*, 10 Cush. 186. And his land may be of peculiar value by reason of its situation affording opportunities to do this. *Ham v. Salem*, 100 Mass. 350.

"It follows that if the land belonging to the complainant, and flowed by the mill-dam of the respondents, in its contemplated and ordinary use, was benefited and increased in market value, either by reason of the ice which by such flowing was formed thereon, and which might be cut and carried away without appreciably diminishing the respondents' water power, or by reason of the more convenient opportunity thereby afforded to the complainant, by the use of his own land, to exercise the right, which he enjoyed in common with the whole public, of taking ice from the natural pond by which his land so flowed was bounded, such benefit was to be taken into consideration by the jury in estimating the damages which he was entitled to recover for the flowing."

In *Myer v. Whitaker*, New York Supreme Court, Ulster Circuit, January, 1878, S., who had built a dam on a stream on his own land, obtained by grant from O., a separate owner above him, the right to overflow the land of O., without any limitation as to the use of the waters held back by the dam. *Held*, that S. or his vendee was entitled to the ice formed in the water overflowing the lands of O., and could recover the value of the ice taken therefrom by a third person permitted by O. to take such ice.

The court observed, by WESTBROOK, J.: "This action, which was one for the recovery of the value of certain ice taken from a pond caused by a dam across the Esopus creek, in the town of Saugerties, Ulster county, was a trial by the court without a jury. On such trial the following facts were established:

"The Esopus creek is a natural running stream of water emptying into the Hudson river at Saugerties aforesaid. About the year 1826 or 1827 a dam twenty-eight feet in height was built across it and has ever since been maintained, which ponds and flows back the waters of the stream. One Joseph B. Sheffield, at the time of the occurrence of the events out of which this suit originated, was and is now the owner of the land upon which the dam rests, and also was the owner of all the land covered by the waters of the pond, except a small part thereof, which belonged to the Overburgh family. That family, however, by deed dated April 24, 1841, for the consideration of \$5,750, had conveyed to the grantor of Sheffield 'the right, privilege and liberty to overflow so much of the said lands, falls and water privileges above mentioned as are now, or at any time hereafter may be, overflowed by means of the said dam across the Esopus in the year above mentioned, or by any other dam which may be erected in place of said dam.' The recitals in the deed show that the dam was erected during the years 1823 and 1827, and the waters by means thereof had overflowed the lands of the grantors, and rendered valueless to them certain falls in the stream.

In February, 1876, the firm of Myer & Rosepaugh, of which the plaintiff is the survivor, purchased all the ice in the pond, formed and to be formed — there being some reservations which are not material to be stated — from Joseph B. Sheffield.

"Previous to the gathering of the ice from the pond, a freshet occurred in the Esopus creek which carried out of the pond a large part of the ice formed therein, and loosened that which was in controversy in this action from the shore, and would probably have swept this out also, had not the plaintiffs, by holes cut therein, fastened it to the shore and thus detained it.

Ice during the winter of 1876 was comparatively scarce and valuable. The plaintiffs had a contract for all the ice in the pond at \$1.75 per ton stacked, and the cost of stacking and cutting was about half that sum, leaving a profit of 87½ cents per ton.

"After the plaintiffs had commenced to remove and gather the ice, the defendants went to the part of the pond over the Overbagh lands by permission from such family, and cut a large quantity of ice thereon against the forbidding of the plaintiffs, and in spite of such forbidding opened a canal or channel across the pond, and over that part of it which was upon the land to which Sheffield had title, and floated the ice so cut by them through such canal or channel, and gathered and sold the same in the New York market. For the value of the ice so taken by the defendants a recovery is sought in this action.

"As the firm of Myer & Rosebaugh, of which plaintiff is the survivor, claims under a purchase from Joseph B. Sheffield, the first question which this case presents is: What right of property, if any, did Sheffield have in the ice cut and removed by the defendants? The water from which the ice was formed was ponded and gathered by him for his own use. He owned the dam which ponded and held it, which was located upon his own property. All the land under the water of the pond was his, except a small part thereof owned by the Overbagh family, and upon and over that part of the land he held, by purchase as the owner thereof, the right to flood and to hold the water. In a basin, then, formed mostly out of his own land and in part out of the land of another, the right to use which for that purpose had been purchased for a valuable consideration from the owner, Mr. Sheffield had gathered a large body of water for his own use and benefit. The manner of its use and the mode of its application to his own use was not restricted by any deed, conveyance or title which he held, nor by any rule of law except the general one, that the flow of a natural stream shall not be so obstructed as to deprive owners below of the beneficial use and enjoyment of the stream and its flow. So long as such owners below were not interfered with, Mr. Sheffield, as the former and owner of the basin which held the water, had the right to use such water for his own profit; he could use its momentum to propel machinery and let that right to others. He could use the water for domestic and farming purposes, and could let and rent that right to others. All these consequences follow, it seems to me, from his act of appropriation and gathering them. The land basin, or vessel which held them, was his as owner in fee or as owner for use. By his dam he had filled that basin or vessel, and the water thus gathered or held therein was his, subject only to the exception that the beneficial enjoyment of owners below should not be interfered with, just as much as if he had gathered them for his own use and benefit into a tank or cistern which had been constructed for that purpose. The right to use and to sell the water in its liquid form is only a part of his right. When the form of the water changed by cold into ice, Mr. Sheffield had, it seems to me, the right to use it in its congealed form, and the same right to sell it and permit it to be gathered before it returned to its liquid state, as he had to use and dispose of when in the latter condition. There can be no difference as to his rights growing out of the state of the water.

"All this appears so elementary and clear, and so plainly deducible from principles long established as to be scarcely worthy of argument, were it not for the case of *Marshall v. Peters*, 12 How. Pr. 218, upon which the defendants rely. In that case, which was very similar to this, a judge (EMOTT), for whose learning and integrity I have a profound respect, held that the party purchasing ice from the owner of a pond could not have an injunction, against a trespasser who undertook to remove it. If the refusal to allow the injunction to continue had been put upon the ground that the plaintiff had an adequate remedy at law, and the insignificant value of the ice in controversy, the decision would not apply to the case before us. The learned judge, however, goes further and states principles and reasons for his conclusions, which, if they are sound, control this cause. Examination and reflection compel me to dissent from the opinion rendered in the case cited, and the reasons therefor will now be stated.

"The judge (pages 222 and 223) says: 'But it is quite as far from being true, that Mr. Lent is the owner of the water in this pond, or that it, or the ice formed from it, is his absolute property. The water in a running stream can never become, in any such sense as was claimed on the argument, the property of a riparian proprietor, even if he owns both banks, and the stream passes through his lands. All the property that a man can acquire in flowing water is a right to its use. He may have a certain right of property in it, but the water itself is not property. He has a right to its natural flow and to use it for his cattle, or

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his household, or upon his mill-wheels. But he cannot stop its current, nor direct its flow, nor increase or diminish it in any appreciable quantity. He must allow the waters to pass out of his hands as they enter them, and his only right is a right to use them as they flow.'

The error, with deference it is said, which the learned judge makes, is the over statement of a general proposition and the want of a proper application of certain qualifications, the existence of which he recognized, to the general rule which he asserts, and upon which his decision is founded. It may be true, as he says, that the possessor of the mill-pond is not the 'owner of the water,' and the same is not 'his absolute property,' provided, the judge means, that the owner of the pond does not own absolutely and exclusive *all* the water therein. This of course must be true, for if it were not, the riparian owner above could use the entire water of the stream, and thus prevent its natural flow and beneficial enjoyment by the owners below. It is also, however, true, and this the judge admits when he says 'he may use it for his cattle, or his household, or upon his mill-wheels,' though he fails to give it weight, that the owner has the absolute property in the use of the water as it flows, not only in the application of its momentum, but also in its removal from the stream for consumption, provided the usefulness of the stream to the owners below is not impaired. And it follows from this concession, because it is one of the rights of absolute property, that if such ownership as has been described is in one man, he may convey the right he thus owns to another, the buyer taking it with the same limitations that the title which he acquires to the water, liquid or solid, is subordinate to the rights of owners below, which must not be interfered with. To this extent then there is absolute ownership in water — or its use, if that expression be preferred — which the learned judge concedes. Having made this concession, it seems to me, that his statement that there can be no 'absolute property in the water of a pond, or the ice formed from it,' is too broad if applied to all the water, and is not limited in meaning as the judge in his general argument seems to admit. It is too broad because the right to use the water for domestic purposes, or to sell it for his own profit, and take it from the pond, and from the general flow for these purposes, subject only to the exception in favor of owners below, before stated, being conceded, it follows that the owner has some absolute property in the water — in its normal state or when frozen — which he needs, and which is capable of being forced against one, who, without right, deprives the owner of its use or of his gains from a sale. If as against such owner and his needs, the stranger can take some he may take all, and the ponder of the waters would have no rights which the law can protect. If the judge had borne more clearly in mind the extent of absolute property in water which may exist and of his concessions, he could not have held that the congealed water which the owner needed for his own profit, and which did not interfere with the natural flow of the stream, nor with the beneficial enjoyment thereof by riparian proprietors below, could be removed by a mere naked wrong-doer at pleasure. This conclusion I regard as unsound, and is entirely at war with other adjudications and principles which will now be referred to.

"In *Mill River Woolen Manufacturing Co. v. Smith*, 34 Conn. 462, it was held 'That owners of the water of a mill-pond own the ice formed upon it, and the riparian proprietors had no right as owners of the soil to remove it.'

"In *State v. Poltmeyer*, 33 Ind. 492; also reported in 5th American Reports, 234, it was held 'When the water of a flowing stream, running in its natural channel, is congealed, the ice attached to the soil constitutes a part of the land and belongs to the owner of the bed of the stream, and has the right to prevent its removal.' This case is worthy of attention because it was most carefully considered and elaborately discussed. It had been to the Supreme Court of Indiana once before upon the quashing of the indictment. The court then held the indictment good, because the ice might have been taken from a pool upon the land of the owner, and therefore refused to consider or decide whether there could be property in ice formed in a running and unnavigable stream. Upon the trial of the indictment, the court below held there could be no property in ice formed in a running stream. The court above held the contrary, and reversed its judgment. See an article upon this case in 3 Albany Law Journal, page 386.

In *Elliot v. Fitchburg Railroad Co.*, 10 Cush. 191; in *Brown v. Brown*, 30 N. Y. 519, and in many other cases, it has been held that the ponder of waters has a right to make any use thereof which is not inconsistent with the rights of owners below. The effect of this doctrine, which is identical with that stated in the beginning of this opinion, is that this right

of use, which may be to propel machinery, for domestic purposes, for sale and for hire, is property of which the owner cannot be deprived by a mere wrong-doer. If owners below are interfered with they will be protected against the improper or wasteful use of the water by the owner above, but as against all others who are strangers to those rights, the owner of the pond will be protected in the enjoyment of the use of the water, whether it be carried to his mill to propel his machinery, to his house, or barn for consumption, or to the property of others to whom he sells or lets it for like use, and this right of use of the water is without regard to its state or condition. It might as well be said that its use is confined to the frozen state entirely, as to say it is confined to the liquid solely. This principle so long and well settled must control this cause.

The only seeming difficulty which this case has presented to my mind grows out of the fact that the ice in controversy was taken from that part of the pond which was above the lands of the Overbagh property, the owners of which gave permission to the defendants to do the acts complained of. Reflection, however, satisfies me that this fact cannot prevent a recovery, because,

First. The defendants not only removed ice from that part of the pond which was upon the Overbagh land, but against the forbidding of the plaintiff they cut a channel across the entire pond, thus removing and destroying the ice which was formed in that part of the pond which was upon the Sheffield property, and for the ice thus destroyed at least there must be a recovery.

Second. By the conveyance of the Overbagh family, the right to flow back the waters, and hold them in the pond for the benefit and use of the owner thereof is transferred, and that right Mr. Sheffield now has. There was no limitation whatever upon the use to which the pond could put the waters, nor any reservation whatever to the Overbagh family in the water. In short, the effect of the Overbagh deed was to enable the owner of the right, by a dam, to make a large basin to hold water for his own use and purposes. Whatever rights, if any, the Overbagh family had, or retained in the water, were subordinate to those of the owner of the right to pond. Being subordinate to those rights, the owner of the pond having need of so much thereof as was frozen, and such use being consistent with his ownership, as we have endeavored to show, no act or consent given by any of the Overbagh family could deprive the owner of the ponded water of the use to which he had applied it. This very principle is decided in *Mill River Woollen Manufacturing Co. v. Smith*, 10 Conn. 462, before cited, in which it was held that the owner of the pond as against the owner of the land could prevent the removal of the ice. If it can be done because the owner needs the water in its liquid form, it can be done when the owner requires and needs it in its congealed form. The right to pond being for an unspecified purpose, its right of use and its manner of use depend upon the needs of the owner, to which all other rights are subordinate."

SEARS V. GIDDEY.

(41 Mich. 590.)

Marriage—liability of husband for expenses of wife's burial.

A husband and his adult son went together to an undertaker and together ordered a coffin and carriages for the funeral of the wife and mother. Nothing was said as to who was to be charged. *Held*, that the husband was liable. (See note, p. 170.)

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

Ward & Palmer, for plaintiff in error.

W. B. Jackson, for defendant in error.

COOLEY, J. The question is made in this case whether under the circumstances which will be stated the husband is liable for the undertaker's bill at the funeral and interment of his wife.

When the wife died, defendant and one Baxter, a son of the wife by a former marriage, went together to the plaintiff, and gave orders for a casket and other goods, and also for hacks for the funeral. Nothing was said respecting payment, or who was to be charged, and defendant no more ordered them than did Baxter. The charge, however, was made to defendant. When the bill was presented to defendant, he refused to pay, assigning as a reason that the deceased had property of her own which she had willed to Baxter, and therefore Baxter should pay. Plaintiff then called upon Baxter who also refused, but finally loaned to plaintiff the amount of the bill on an understanding that plaintiff should sue defendant and recover the amount for Baxter's benefit. Under these facts the judge instructed the jury that their verdict must be for the defendant.

I. The common-law liability of the husband for the funeral expenses of the wife is not disputed in this case. We must therefore find in the facts some special reason for exemption or the judgment cannot stand.

II. The fact that the woman had an adult son, who accompanied the husband when the order was given, can constitute no reason. The undertaker naturally and properly assigned the credit to the person whose duty it was by law to make provision for the funeral. It was not necessary for the husband to say "I will pay," or for the son to declare "I will not pay," in order to determine who was contracting; formalities may well be dispensed with on such an occasion, and the law will presume the proper party understood he was to be charged. Mere presence and assistance in making selections or giving orders cannot establish a liability without express words of promise, but the party to whom the law assigns the duty will be charged by legal implication.

III. There was no showing in this case that the wife left property, but the fact is not important. A funeral cannot be delayed for judicial inquiries to determine upon whom the moral obligation to proceed with it rests most heavily. Nor if husband and son quarrel

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about the expense over the grave of the wife and mother, can the undertaker be compelled to await a judicial adjustment of their dispute. The husband being liable to him, he need look no further.

IV. It is urged that the arrangement between the plaintiff and Baxter was a payment of the demand, but we do not think so. It was either a loan or a purchase of the demand; and in either case this action is attainable.

The judgment is reversed, with costs, and a new trial ordered.

Judgment reversed.

The other justices concurred.

NOTE BY THE REPORTER.—In *Darmody's Estate* (Leg. Int., March 7, 1879), it was held by the Orphans' Court of Philadelphia that a surviving husband is primarily liable for the expenses of a wife's funeral suitable to the rank and fortune of the husband. Although the undertaker may in such case recover from the executor of the deceased wife, the executor may in turn recover from the husband. And this rule is not affected by the fact that the wife left a separate estate, nor that the wife is given by law the exclusive possession and control of her separate estate. In *Smyley v. Rees*, 53 Ala. 29; s. c., 25 Am. Rep. 508, it was decided that although by the statute of Alabama a married woman is entitled to the exclusive use and ownership of her separate estate free from any claim or control of her husband, and the husband is not liable for her debts, yet the husband, as at common law, is bound to pay the wife's funeral expenses, and cannot claim reimbursement therefor out of her estate, nor for a monument which he erected at her grave. This liability rests on the same ground as his liability for the wife's support while living, from which the married woman's statutes have in nowise released him; and it is not limited to furnishing the means of a burial which shall conform merely to the requirements of public decency. In *Jenkins v. Tucker*, 1 H. Black. 90, the wife having died while her husband was abroad, her father directed and paid the expenses of her burial. The husband having upon his return refused to pay the father, suit was brought. It was held, all the judges concurring, that under such circumstances "a third person who voluntarily pays the expenses of a wife's funeral (suitable to the rank and fortune of the husband), though without the knowledge of the husband, may recover from him the money so laid out." In *Bertie v. Lord Chesterfield*, 9 Mod. 31, the estate of the husband in possession of his devisee was charged with the payment of the testator's wife's funeral expenses. In that case it should be observed the husband died after the wife's funeral, for it has been held that the husband's estate is not liable for the wife's funeral expenses, following the principle that a wife's authority to bind the husband is revoked by his death. *Lewell v. Kreddler*, 3 Rawle, 300.

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BEWICK V. FLETCHER.

(41 Mich. 625.)

Fixtures — estoppel of owner — agreement to replace.

A. put up salt-well-boring machinery in a house on the land of B., under an agreement, for the ownership of the land and business, which was not carried out. B. sold the land to C. A. removed part and was removing the rest of the machinery, against C.'s objection, when they entered into a contract

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by which A. agreed that if C. would let him remove it, to bore a well elsewhere, he would afterward return and replace it as before. *Held*, that the machinery did not pass by the conveyance, and the agreement did not bind A.

TRESPASS on the case. The opinion states the facts. The defendant had judgment below.

J. D. Turnbull, for plaintiffs in error.

Kelley & Clayberg, for defendant in error.

CAMPBELL, C. J. Plaintiff sued defendant in trover for the conversion of certain machinery which had once been in a drill house set up for boring a salt well in Alpena. The property where the machinery was first set up had been owned by one Lockwood. Fletcher made an arrangement with Lockwood whereby it was contemplated that he should furnish the machinery necessary for sinking a well and erect certain salt blocks and some other apparatus, in consideration whereof he was to have a half share in the land and business. Fletcher put up the drilling machinery in question, but the well was not sunk and the arrangement was never carried out, and he made no transfer.

Lockwood sold the land to plaintiffs. Their only title to the property depends on its having become appurtenant to the land, or on a subsequent contract from Fletcher which will be presently referred to. If not a part of the realty, Lockwood could not have sold it to them, and did not in fact make any assignment of any different character.

It is not important to look into the very elaborate and extended discussion of the doctrine of fixtures contained in the charges and requests, because the facts do not require it. The machinery was put upon the ground to sink a well — which is a temporary purpose. It was not so attached to the freehold as not to be removed without injury, and therefore, on well-settled principles, it could not become realty without being either intended or especially adapted for permanent use as a part of the freehold. There is nothing in the case to indicate this, and the jury, if there had been, were properly directed on this head. There is no presumption of such a union. The presumption is all the other way. *Wheeler v. Bedell*, 40 Mich. 693.

The plaintiffs, however, claim that Fletcher is estopped by a

subsequent arrangement from denying their right. After the Lockwood project was abandoned, it was desired to use this machinery to sink a well for other parties, and Fletcher removed part and was preparing to remove the rest against plaintiffs' objections, when they entered into an amicable contract signed by Fletcher, whereby he promised to return the property and replace it in the same condition after the new well was finished, if they would let him remove it.

We think it very clear that this agreement cannot be construed into any thing more than a promise to put the property back where it was before. It is no relinquishment of right, and no recognition of any title in plaintiffs.

If Fletcher owned the property, they had no right whatever to impose terms, and there was no consideration for any contract on his part to give up either title or possession.

There was nothing in the case to sustain the plaintiffs' claim, and the correctness or incorrectness of some of the rulings can make no difference in the result.

Judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

WOODIN V. PHOENIX.

(41 Mich. 655.)

Judge — jurisdiction — appointing himself referee.

*It seems, a judge cannot appoint himself referee even by consent.**

CERTIORARI. The opinion states the case.

George P. Voorheis, for plaintiff in certiorari.

Elliott G. Stevenson and O'B. J. Atkinson, for defendant in certiorari.

GRAVES, J. This is a *certiorari* to the Circuit Court for the county of St. Clair to revise the action of the judge in ordering his own appointment on stipulation as one of three referees, and to re-examine other proceedings following such action.

The writ was directed to the court and not to the judge, and the court records fail to show that the Circuit judge and the referee,

* See note, 25 Am. Rep. 539.

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though of the same name, were the same person. The judge, however, has transmitted his personal answer, and that shows the fact of identity. But this answer is a voluntary proceeding, and is not regularly a component of the return.

The case is not, therefore, fully presented, for want of a regular showing of the material fact just mentioned, even if we admit *certiorari* to be the proper remedy. But we are inclined to think it is not, and that the remedy applicable was *mandamus* to compel the setting aside of the proceedings.

As there seems to be no question about the facts, we are disposed to intimate our opinion briefly upon the case.

We think it was not competent for the judge to clothe himself with the character of referee in the cause. The fact that he was judge in the same case was a disability. The functions are incompatible. The law intends that the character of referee and that of judge shall not co-exist in the same person, and they cannot be combined under our laws without confusion and disorder. The two positions are contemplated as separate, and as securing within limits the considerate prudence and judgment of two minds instead of one. The referee determines in the first place, but his findings are subject to scrutiny and revisal by the judge. The judge may expedite the reference, compel the referee to report or to sign a bill of exceptions, and may dismiss him on cause shown; and the referee may certify to the judge for his decision the contumacy of a witness, and he is allowed to have pay for his services as referee, and which may be taxed as costs in the cause. In fine, the whole system of regulations is repugnant to any fusion of functions.

The effect of the reference and of the subsequent proceedings was to cause a discontinuance of the action. Although the judge was called to act as referee by the written nomination of both parties, and his subsequent action in sitting as referee was by their mutual desire, we cannot put aside the objection, however ungracious it may appear. It is a matter of jurisdiction.

The view taken of the present proceeding, however, prevents giving any actual redress and requires a dismissal of the *certiorari*. The intimation given will doubtless render any further application unnecessary.

Judgment dismissed.

The other justices concurred.

CASES
IN THE
SUPREME COURT
AND
COURT OF ERROR AND APPEALS
OF
NEW JERSEY.

STATE V. GRAHAM.

(12 Vroom, 15.)

Criminal law — testimony of accomplice — subsequent trial of accomplice.

Where an accomplice has confessed, and his testimony has been received and used by the prosecution upon the trial of the other defendant, who has been convicted, he has an equitable claim to pardon, or the court may enter a *nolle prosequi*, but he is not entitled to discharge as a matter of right.*

APPPLICATION for *nolle prosequi*. The opinion states the facts.

J. P. Stockton, attorney-general, for the State.

BEASLEY, C. J. The defendant stands indicted for the crime of murder in the first degree. His accomplice was Benjamin Hunter, who has been convicted and executed. The defendant being

* To same effect, *State v. Lyon* (81 N. C. 600), 31 Am. Rep.

State v. Graham.

arrested, acknowledged his guilt and implicated Hunter, and both before the grand jury and at the trial of the latter, was a witness against him. It is admitted that the confession of the defendant was without reserve and was complete. The indictment against him has been brought here by *certiorari*, and the attorney-general now asks the advice of this court whether, in view of these facts, a *nolle prosequi* should be entered, or if not, what other course should be pursued.

The English practice on such occasions seems to have assumed, long since, a settled form. It is this: when an accomplice is received by the court as a witness against his fellows, and makes a full disclosure, without prevarication or fraud, the understanding is that there is an implied promise that he will be recommended to the mercy of the crown. Such a procedure is obviously a substitute for the ancient method of approvement, which appears to have been obsolete even in the time of Lord HALE. The course in pursuing this old form was for the culprit, indicted for treason or felony, to confess the truth of the charge, and upon being sworn to reveal all the treasons or felonies within his knowledge, and to enter before a coroner his appeal against all his partners in crime who were within the realm. The criminal thus confessing was called the approver, or in Latin, *probator*, and the person implicated was styled the appellee. By this confession and appeal the approver put it in the discretion of the court either to give judgment and award execution against him, or to respite him until the conviction of his partners in guilt; and if it was deemed advisable to admit him as an approver, and then if upon being sworn, he made a full and true disclosure, and also convicted the appellee, either by his oath or on wager of battle, the king, *ex merito justitiæ*, pardoned him "as to his life." This practice, with its conditions that the appellee could claim a trial by battle, and that grace to the approver should be dependent on his conviction of his associate in crime, was plainly at variance with modern sentiments and habits, and the consequence was that it passed out of use; but as the purpose it served was of value to juridical administration, it was inevitable, in the ordinary development of the law, that some equivalent should take its place. That equivalent was the modern practice, before referred to, of an implied pledge that the court would recommend the criminal who made a confession and was accepted as a witness, to the royal clemency. But such an implied pledge is

not a legal right, but a ground for an equitable claim only, so that under no circumstances can it supply matter for a plea in bar, or otherwise constitute a basis of a defense. It may be that such a confession made in the confidence of a recommendation to mercy would not be considered voluntary in the legal sense, so as to legalize its introduction against the criminal on his trial, but this right of exclusion would seem to be the only right growing out of the affair that he could claim, *ex debito justitiæ*. The case that is the leading one on this subject is that of *Rex v. Rudd*, Cowp. 332. In this case Lord MANSFIELD, after pointing out the three ways in law and practice which give accomplices a right to a pardon, which are, first, in case of approvement; second, the case of persons coming within certain statutes; and third, the case of persons to whom the king has, by special proclamation in the gazette or otherwise, promised his pardon, thus describes the modern method: "There is, besides, a practice which does not give a legal right, and that is where accomplices, having made a full and fair confession of the whole truth, are, in consequence thereof, admitted evidence for the crown, and that evidence is afterward made use of to convict the other offenders. If in that case they act fairly and openly, and discover the whole truth, though they are not entitled of *right* to a pardon, yet the usage, the lenity and practice of the court, is to stop the prosecution against them, and they have an equitable title to the recommendation for the king's mercy." That this is the course invariably taken by the English courts will plainly appear by reference to any of the leading text-writers. 2 Russ. on Crimes, 928; 1 Phil. Ev. 21; 4 Bl. Com. 329. In giving effect to this proceeding the common mode is for the court to respite the trial until an opportunity is offered of making the promised application for the royal pardon.

The practice thus described has been approximately followed, very generally, by the American courts, and I have no doubt that it is a part of our inherited jurisprudence, for it was completely in vogue when our colonial existence terminated. It will be observed, however, that the closest assimilation that can be effected between our practice and its English model is by putting the confessing criminal on trial, and then, on his being found guilty, for the court to commend him to the clemency of the Court of Pardons, because, in this State, the power to remit the punishment exists in that tribunal only after the conviction of the criminal. I have no doubt,

therefore, that if the present defendant should be put upon his trial and should be convicted, that it would be the duty of the judge presiding at the trial, if he should be satisfied that the confession of the prisoner on the trial of the accomplice was true and complete, to recommend him to the merciful consideration of the Court of Pardons. And perhaps no case can be found, either at home or abroad, in which such recommendation has not, in some measure, prevailed. According to the English routine, an entire immunity appears to have been, so far as I have observed, the result, without exception, of the judicial application; but in this country there is one recorded case, at least, in which, instead of an absolute pardon, there was a commutation of the capital sentence to a milder punishment. This instance is referred to in the opinion in the case of *People v. Whipple*, 9 Cow. 714.

But this is not the judicial power to which an appeal is now made. If the prisoner should be tried and convicted, it has been shown that the course to be taken is entirely settled by the precedents; but the question now asked is whether the court will advise that this prosecution shall, antecedently to a trial, be abandoned. I have no doubt that it is within the competency of the court so to advise, and that in such case it would be proper for the attorney-general to act in accordance with such advice. It is indispensable to a just and convenient administration of the criminal law that an extensive authority to regulate and control prosecutions should be lodged in the courts. It is not every indictment that should be tried, and sometimes the public welfare requires that even the guilty should be acquitted. Accordingly it is the well-settled practice for the courts, both in England and in this country, to direct, when the occasion calls for it, the acquittal of an accomplice, so as to qualify him as a witness against his companions in crime. The books are full of precedents to this effect. In *Regina v. Owen*, 9 C. & P. 83, which was an indictment for a felony, it was proposed on the part of the prosecution that one of the prisoners should be acquitted before the case was gone into, as he was wanted as witness against his associates; and upon this being opposed, Justice WILLIAMS, having conferred with ALDERSON, B., said: "I had little doubt as to the course I ought to take, and my learned brother entirely agrees with me that this is a matter of ordinary occurrence. In cases of this kind, the court, if it sees no cause to the contrary, is in the habit of relying on the discretion of

the counsel who conduct the prosecution. I shall therefore, in this case, intrust it to the discretion of the counsel whether he will have the prisoner acquitted before the case is gone into or not. I think it almost of course." It will be observed that such authority far transcends that power which the court is now called on to exercise, inasmuch as an acquittal is, unlike a *nolle prosequi*, a bar to any further prosecution for the same offense. And I think it has been quite a common practice in this State for the court to assent to the abandonment of indictments against accomplices who have been witnesses; indeed, I do not know of any instance in which a recommendation to mercy has ever been sent to the pardoning power in behalf of a criminal who had been used as a witness, at the instance of the State, a circumstance which shows conclusively that it has been the prevailing mode either to let the indictment drop, or for the court, with the assent of the prisoner, so to adjust its sentence as to supersede the necessity of a recommendation for a remission of the sentence of the law. It seems to me that if, in this case, this prisoner should signify to this court his waiver of his claim to a judicial recommendation for mercy, and in lieu of such recommendation should declare his willingness to plead guilty of a lesser crime than that of murder in the first degree, it would be entirely consistent with legal principles and the ordinary course of procedure for this court, in its discretion and at the instance of the attorney-general, to sanction an acceptance of such plea. Whether this course, or an acquittal at the trial, or a recommendation to mercy after conviction, or a resort to a *nolle prosequi* shall be adopted, is a question that addresses itself to the judgment of the court, in view of the circumstances and characteristics of the particular case. That it is proper, in some cases, to abandon the prosecution against the accomplice is the doctrine exemplified in the case of *United States v. Lee*, 4 McLean, 103. The indictment in that case was for a capital offense, and the public prosecutor offered a motion to discharge an accomplice who had been admitted as a witness on the side of the government, but the court said that "the government is bound in honor, under the circumstances, to carry out the understanding or arrangement by which the witness testified and admitted in so doing, his own turpitude. Public policy and the ends of justice require this of the court." The result was that the court decided that if the district attorney should fail to enter a *nolle prosequi*, that the cause would be continued until a

pardon could be applied for, but suggesting "that to discontinue the prosecution is the shorter and better mode." In Massachusetts also the modern English practice in this particular is recognized as prevailing, and, accordingly, in the case of *Commonwealth v. Knapp*, 10 Pick. 493, this language is used by the court: "The law touching approvement has not been adopted in Massachusetts; but instead of that the laws and the usage have been to admit persons as witnesses for the State, and they are to be treated here, in regard to confessions, as witnesses for the crown are in the mother country." Indeed, so far is Mr. Bishop from thinking that it is not legitimate, according to the American practice, to abandon the prosecution in such cases, that he expressly says that in this country, "In most instances, the prosecuting officer declines to institute criminal proceedings against him, or if proceedings have been begun, he simply discontinues them by a *nolle prosequi*, or other proper means." See, also, to the same purpose, 1 Greenl. Ev., §§ 363, 379. The only dissent, in the least degree, from this general line of authorities is the case of *Commonwealth v. Dabney*, 1 Rob. (Va.) 696, and this deviation is, in a great measure, to be accounted for by the existence of a statute that materially modified the subject. From my examination of the authorities, and from my knowledge of the course of practice, I am clearly of opinion, as I have already said, that it is entirely within the rightful province of this court to assent to and advise the entering of a *nolle prosequi* in a case of this kind, whenever the exigency of justice or the public convenience requires such course to be adopted.

As the subject, so far as the expression of judicial opinion is concerned, is a novel one in this State, I have thought it well to express my views with respect to the general principles by which it is regulated, and it will be perceived that my conclusions are as follows, to wit :

First. That if an accomplice be convicted after having been made a witness by the State, and received as such by the court, and after having made an ingenuous confession, such accomplice has an equitable claim to a judicial recommendation to the mercy of the pardoning power, which cannot be withheld without a violation of an established rule of practice.

Second. Such a recommendation has been, without any known exception, hitherto effective in obtaining some remission of punishment.

Third. That instead of the foregoing course, it is competent for the court to order the accomplice to be acquitted at the trial, for the purpose of qualifying him as a witness for the State, or to accept from the defendant a plea admitting guilt to such a degree as, in the opinion of the court, is requisite, or for the court to assent to the entering of a *nolle prosequi* by the attorney-general.

Such being deemed the practice and the scope of judicial authority, the only remaining matter for decision is with respect to the course that it is proper to take on the present occasion.

Upon full consideration of the nature and circumstances of the present case, the court has come to the conclusion to advise the attorney-general not to enter a *nolle prosequi*. The public faith was not pledged to the defendant, either by expression or implication, that protection to this measure would be extended to him. An implied promise on the part of the court to recommend him to the mercy of the Court of Pardons is all that he can justly claim, and that pledge, if he should be convicted, will doubtless be redeemed. To what extent such recommendation will be efficacious, it will remain for the tribunal in which the Constitution has placed the power to pardon, to decide. If the defendant should apply to be permitted to plead guilty to the crime of murder in the second degree, the court will listen to such application, and will then decide, when the matter is before it, what answer shall be given to such request. For the present, our decision is, that the prosecution should not be summarily dismissed.

WRIGHT V. REMINGTON.

(12 Vroom, 48.)

Marriage — charge of wife's separate property by note — comity — duress — seduction.

Under a statute of Illinois, providing that "contracts may be made and liabilities incurred by a wife, and the same enforced against her in the same manner as if she were unmarried," a wife may bind her separate property by a note executed there as surety for her husband, and it will be enforced in New Jersey, although there is no similar provision in the latter State.

▲ threat by a husband, conveyed through a payee, that he will poison himself unless his wife signs a note as surety for him, by means whereof she is in-

Wright v. Remington.

duced so to sign, does not amount to duress such as will avoid her contract. (See note, p. 185.)

Parol evidence of declarations by a payee to maker, indorser, or guarantor of a note, at the time of signing, that such signer shall not be called upon to pay the note, is incompetent.*

FEIGNED issues to test the validity of confessions of judgment on notes executed by S. Remington, and Emma M., his wife, at Chicago, Illinois, and payable there. The facts appear in the opinion. Judgment below for defendant, Emma.

H. A. Drake, for plaintiff.

R. S. Jenkins, for defendant.

REED, J. The admission of the statutes of Illinois was entirely proper under the provisions of section twenty-two of our Evidence Act. Rev., p. 381. The last statute offered was relied upon by the plaintiffs to show the validity of the contract of married women in Illinois, the place of the making and performing the same. The sixth section of the said act — Rev. (Ill.) 1874, p. 576 — is as follows: "Contracts may be made and liabilities incurred by a wife, and the same enforced against her to the same extent and in the same manner as if she were unmarried, but, except with the consent of her husband, she may not enter into or carry on any partnership business, unless her husband has abandoned or deserted her, or is an idiot, or insane, or is confined in the penitentiary."

The proviso contained in the fifth section of our Married Woman's Act is absent from the Illinois statute, and there appears in the latter no restriction upon the contractual ability of the married woman to become indorser, surety or guarantor. Subject to the exceptional instances of her engaging in partnership business, she is as unrestricted as a *feme sole*. There can therefore be no question but that the contract was valid by the law of Illinois.

It is therefore the duty of the courts of this State to recognize and enforce it, unless it appears injurious to the interests of the State or of our citizens. But nothing approaching this result can be deduced solely from the fact that the foreign statute confers upon a married woman the power to make a contract of suretyship.

*To same effect, *Rodney v. Wilson* (87 Mo. St. 128), 29 Am. Rep. 499.

That it would have been an act of legislative wisdom to have incorporated into the Illinois act a provision similar to that in our own and the New York State Married Woman's Act, by which the married woman is restrained from assuming a liability as surety,* I think the testimony in this case demonstrates. But whatever may be our opinion of the policy of legislation beyond our State, we are bound by the principles of comity to recognize its validity, unless it clearly contravenes the principles of public morality or attacks the interest of the body of the citizens of our State. This does neither, and there is no force in the objection taken upon this ground.

The next ground of contention by the defense at the trial was relative to the effect of the acts of the husband, and also of one of the payees and his attorney toward the married woman before and at the time of signing these notes.

The court charged the jury, substantially, that if threats were made by the husband, through the procurement of the payees or their agent, that he, the husband, would kill himself unless she signed, and the threats were made for the purpose of inducing, and did induce, her to sign the notes, then the woman was not liable upon the notes. The court also charged that even if the threats were made without the knowledge of the payees, and were of such a character as to deprive her of the power to choose whether she would or would not sign, etc., then she was not liable. Both of the above instructions were given obviously upon the assumption that the facts upon the existence of which they were predicated, showed such a coercion of the will of the woman as to deprive her of the power of volition, and so the contract was stripped of an essential element, namely, the assent of both parties to its terms.

The common law, however, very early guarded the stability of contracts by a rule which required the exercise of a much higher degree of coercive force than here appears, before the question of want of the power of consent could be entertained as a question of fact. The degree of restraint or terror to which the party must be subjected, as a ground for avoiding his contract, must rise to what the law recognized as duress, and the statement of the grounds of such avoidance appears in the earliest books of authority. *Bac. Abr.*, "Duress."

* There is no such provision in the New York statute, and it is there held that she may charge her separate property for a liability as surety.—R&P

These grounds were stated in the case of *Sooy* ads. *State*, 9 Vroom, 329, and a repetition of them here would be profitless. The language in the opinion in that case, although used in reference to the avoidance of a bond, is applicable to the avoidance of any contract, sealed or unsealed.

In turning from the statement of what is essential to constitute a defense upon the ground of duress, to the facts in this case, it at once appears that they do not make a case within the rule laid down relative to such defense. There was no imprisonment of the woman or threat of imprisonment. There was no threatened injury to her person.

The influence was, that her husband threatened not to injure her, but to kill himself. It is true that there is the statement in the books that duress to a wife will avoid a deed made by the husband under that influence. Bac. Abr., "Duress," B.

It may be that had the payees of the note or their agent threatened to take the life of the husband unless the wife signed the note, and she signed under the influence of the terror excited by such threats, it would have avoided the contract. But here the threats were made by the husband against his own life. The maker and the object of the threats were the same. Their execution was within his own power of volition. The wife knew that no harm could come to him except by his own act. The present case is utterly unlike an instance of the presence of some overshadowing danger, uncontrollable by either the wife or the person endangered.

There is no trace of a doctrine that the threat of a husband against himself will avoid the contract of his wife, or conversely, and such a rule would lead to an instability in that class of contracts which would be vicious.

I am unable to perceive that any duress, in the sense in which the law has heretofore regarded it, exists in this case either to the husband or through him to the wife.

It is true that the privilege which the law, in many States, has conferred upon the married woman to contract with and for the benefit of any one, including her husband, raises novel questions.

And where the contract is for the husband's benefit in those States where that is possible, the method by which the wife was induced to enter into the contract will probably afford frequent occasions for judicial supervision. But to break down the rules of the common law in treating of the validity of the contract of any

person whom the legislature has seen fit to invest with an unfettered contracting ability, would lead to confusion and uncertainty.

The avoidance of contracts upon the ground of undue influence where, although there is no duress, one of the parties has taken advantage of the situation of the other, is a matter of purely equitable cognizance, and can receive no recognition in a court of law. 1 Chit. on Cont. 273; 1 Story's Eq Jur., § 239.

I think there was no defense upon this part of the case.

The third ground of defense was, that at the time of the execution of the notes, it was represented to Mrs. Remington that the signing was a mere matter of form, and that she would not be held liable. There is no rule better settled than that evidence of contemporaneous parol declarations is inadmissible to vary the terms of a written contract.

In the enforcement of this rule, there is often a strong tendency to disregard its effect, induced by a feeling of the inequity of holding a party to the strict performance of an agreement into which he has entered, upon an assurance that it would not be enforced according to its terms. This feeling has led courts sometimes to recognize the parol declaration, upon the ground that it amounted to an equitable estoppel. *Notes to Duchess of Kingston's case*, 3 Smith's Lead. Cas. 729. But the rule of evidence that when the contract is reduced to writing, the writing is the only evidence of the contract, excludes any evidence of the parol declarations.

The rule is recognized as a wholesome doctrine by which men are enabled to place their agreements in a shape undisturbable by the uncertainty of oral testimony. The weight of authority is overwhelming in favor of holding, in the language of the American editors of the *Duchess of Kingston's case*, that "a person who is so ill-advised as to execute a written contract in reliance upon an assurance that it shall not be literally enforced, must submit to the loss if he is deceived, and cannot ask that a principle of great moment to the community shall be made to yield for the sake of relieving him from the consequences of his indiscretion." See cases cited in note, *supra*.

This rule prevails in equity as well as at law. *Woollam v. Hearn*, 2 Lead. Cas. in Eq. (3d ed.) 679.

The rule is applied, in its entire rigor, to notes and bills. 2 Pars. on Notes and Bills, 501; *Meyer v. Beardsley*, 1 Vroom, 236.

The Circuit Court is advised that no legal defense to the notes in question was offered, and that the verdict should be set aside.

Wright v. Remington.

NOTE BY THE REPORTER.—This case does not deny the principle that duress of a wife is not confined to violence to or imprisonment of her own person, but may be effected through that of her husband, but distinguishes violence to her husband's person by the act of third persons from that of himself. *Eadie v. Slimmon*, 26 N. Y. 9, was the case of duress of a wife by threat of imprisonment of her husband. The court said:

"Judge STORY states the rule as extracted from and confirmed by many cases, as follows: Courts of equity, he says, relieve a party when he does an act or makes a contract when he is under the influence of extreme terror, or of apprehension short of duress; for in cases of this sort he has no free will, but stands *in vinculis*. 2 Story's Eq. Jur., § 230. Circumstances, he says, of extreme necessity, or distress of a party, although not accompanied by any direct duress or restraint, may also overcome free agency, and justify the court in setting aside the contract on account of some attending oppression, fraudulent advantage, or imposition."

"Within the principle asserted in these cases, the present case presents, I think, an instance of a contract procured by undue influence, if one ever existed. The assignment from the plaintiff to the defendant was most clearly extorted by a species of force, terrorism, and coercion, which overcame free agency; in which fear sought security to threats and to apprehensions of injury. It was made as the only way of escape from a sort of moral duress more distressing than any fear of bodily injury or physical constraint. Mr. White, the plaintiff's brother-in-law, called at Eadie's on his return from an evening meeting, and there found the defendant and his counsel, a police officer, and another man. This, I should presume, from the season of the year (April 4th), could not have been later than 9 o'clock. How long these persons had been there at that time does not appear. The defendant and his counsel were in an upper room, and the officer and the man with him in the parlor below. The witness was requested by Mrs. Eadie to go into the drawing-room where the defendant was who was talking very loudly and had some difficulty with her husband. The witness immediately was informed what the difficulty was. The defendant insisted that Eadie should make over to him his house, and that an assignment of this policy should also be made. Eadie refused. Slimmon told him that if he did not, as sure as the sun rose to-morrow he would lodge him in yonder jail; he had an officer down stairs for that purpose. The plaintiff was sent for and came in immediately. The matter was talked over, and much discussion ensued. Mr. Eadie refused to make an assignment of the policy. Slimmon then renewed his threats to arrest Eadie if the policy was not assigned. Mrs. Eadie became much excited, and appeared about to go into hysterics. In the course of the conversation the plaintiff said to the defendant 'Mr. Slimmon, surely you won't take away my husband.' He said, 'He was sorry that he was compelled to do it.' Finally this woman consented, and about three o'clock the next morning the memorandum of agreement to assign the policy and settle the matter was executed by her and her husband. After about six hours of continuous altercation and angry discussion between Eadie and Slimmon, of excitement and distress on the part of the plaintiff, the defendant had accomplished his purpose. Through this period of time the fears and sensibilities of this woman were worked upon by threats of a criminal prosecution which should consign her husband to prison, involving great mortification, shame, and ruin to herself and family, and the wife finally yields to the demands of her husband's creditor. I can imagine no duress over a man—no constraint over his person, or dread of personal injury—more likely to deprive him of free agency, and to induce him to yield to the wishes and demands of another, than the duress over this woman, operating through the appeals thus addressed to her pride, her fears, her affections, and her sensibilities. A deed executed at such a time, under such circumstances, should be deemed obtained by undue influence, and ought not to stand."

Where a note was given by a father under threat that otherwise his son would be arrested on a criminal charge, and twelve months afterward the note was paid without suit, in a suit to recover the sum so paid, it was held proper to instruct the jury, that if they believed the duress was still existing when the note was paid, they should find for the plaintiff. *Schultz v. Culbertson*, Wisconsin Supreme Court, April 1880.

TICHENOR V. HAYES.

(13 Vroom, 183.)

Action — for negligence or deceit — against representatives of deceased wrong-doer.

An action of tort for negligence or deceit lies against the personal representatives of the deceased wrong-doer.

ACTION OF TORT. The opinion states the case.

Alvord & Parrot, for plaintiff.

T. N. McCarter, for demurrant.

BEASLEY, C. J. This is a suit against an administratrix. Some of the counts in the declaration, which is demurred to, are founded on a breach of duty in the defendant's intestate, as an attorney at law, in investigating the title and condition, with respect to incumbrances, of a certain property upon which the plaintiff was about to take a mortgage, and whereby the plaintiff lost the money invested by him. The other counts allege, as the gravamen of the action, certain false and fraudulent representations made by such intestate with respect to certain mortgages, in consequence of which the plaintiff put his money in them, and that such securities proved worthless.

The demurrer that has been put in to this declaration is intended to raise but a single question, which is, whether the cause of action thus stated will survive against the personal representative of the deceased wrong-doer.

The action as to form is in tort. I do not understand, from the brief of the counsel of the defendant, that it is contended that if the suit had been in the mode of an action *ex contractu* for the non-performance of the implied contract that the attorney would exercise due care and skill touching the business of his client, such action would not have survived. Upon this point the law is settled by numerous decisions. In some of these the distinction, with respect to the capacity to survive, that exists between the forms of *assumpsit* and tort is sharply drawn. Such, in this particular, is the aspect of *Knights v. Quarles*, 2 Brod. & Bing. 102, which was a

suit in *assumpsit* by an administrator, growing out of an undertaking by the defendant, who was an attorney, to investigate and see that a title about to be conveyed to the intestate was a good one, the breach being that the defendant failed to do so, and that the intestate, in consequence, took an insufficient title, to the injury of his personal estate. On these facts, the judicial opinion was that such cause of action survived to the personal representative, such result being reached by the rules of the common law, irrespective of any statutory modification. It was considered that the whole transaction rested on a contract, and that a right to sue, arising from a breach, passed to the administrator, and in the course of the opinion read on that occasion it was observed, by way of illustration, "that if a man contracted for a safe conveyance by a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured, though it was clear he in his life-time might, at his election, sue the coach proprietor in contract or in tort, it could not be doubted that his executor might sue in *assumpsit* for the coach proprietor's breach of contract."

This same distinction, in this respect, between these two forms of action, is emphasized in several of the more recent decisions of the English courts. One of these is the case of *Bradshaw and wife v. Lancashire and Yorkshire Railway Co.*, L. R., 10 C. P. 189, which was a suit *ex contractu* by an executrix for injuries inflicted on the testator, in consequence of which, after an interval, he had died, the purpose of the suit being to recover for medical expenses, and the loss that had been occasioned by the inability of the testator to attend to his business. The ground that was expressed for sustaining this action, which was admitted to be a novelty, was that all that was claimed by the plaintiff was compensation for the loss that had fallen on the personal estate, and in form, the suit was for breach of contract, and the doctrine, that there could be no recovery at common law in such a proceeding, by reason of the suffering and death of the person injured, was distinctly stated. *Potter v. Metropolitan District Railway Co.*, 30 L. J. (N. S.) 765, is a case of the same complexion. And the old authorities are to the same effect, as will conspicuously appear by a reference to the summary of them appended, by way of a note, to the case of *Wheatley v. Lane*, 1 Saund. 216, the two decisions from the Law Reports being specially instanced by me, not on account of any novelty in the

grounds of judgment, but for the reason that they exemplify, with more than common distinctness, the limits to which an action on a contract will survive. For it will be observed that these two cases, both in form *ex contractu*, exclude from the recoverable damages all such as do not fall under the denomination of losses to the personal estate. This rule of decision accords with the principle adopted by this court in the case of *Hayden v. Vresland*, 8 Vroom, 372, in which it was held that an action for a breach of a contract of marriage could not be maintained by or against the personal representative of either party to the contract.

Up to this point in my remarks on this subject, my object has been to show that although at common law a certain class of actions *ex contractu* are possessed of the capacity to survive to the personal representative, nevertheless this transmissible remedy is not a complete one; the importance of this circumstance will hereafter appear.

As has been already stated, the present action is in tort, in part for fraud, and in part for a breach of the duty of an attorney at law in not exercising due care and skill in the business of his client; and it cannot, therefore, be doubted that by the mere authority of the common law, the proceeding cannot be vindicated. Consequently, the only debatable question arising in this connection is with respect to the proper construction of sections 4 and 5 of the act concerning executors. Rev., p. 396.

These provisions are not strange to this court. They were considered, and in one of their aspects construed in the case of *Ten Eyck v. Runk*, 2 Vroom, 428. That was an action for damages caused to the plaintiff's land by water backed by the dam of the defendant, and the point decided was that such action was not abated by the death of the owner of the dam, but that it could be continued against his executor. It was admitted in that case that such cause of action would have been extinguished at the common law by force of the rule *actio personalis moritur cum persona*, and its persistence after the death of the defendant was attributed altogether to the effect of the enactment just referred to. That enactment is in these words, viz.: "Where any testator or intestate shall, in his or her life-time, have taken or carried away, or converted to his or her use, the goods or chattels of any person or persons, or shall in his or her life-time have committed any trespass to the person or property, real or personal, of any person or persons,

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such person or persons, his or her executors or administrators, shall have and maintain the same action against the executors or administrators of such testator or intestate as he, she or they might have had or maintained against such testator or intestate."

In the case of *Ten Eyck v. Runk*, all that the court was called upon to decide was whether the term "trespass" in this clause signified those immediate wrongs that are remediable by the action of trespass *vi et armis*, or comprehended also those indirect injuries resulting from a tortious act, the appropriate means of redress for which is an action on the case, and the court put upon the expression this latter and more comprehensive interpretation. It is now urged in the argument of the counsel of the defendant, that while it may be that the case just referred to was correctly ruled, the ground of judgment there adopted was too broad, and that, in the language of the brief, "The true construction of the act limits its application to injury to specific property, real or personal, and not to such a wrong as works no injury to any real or personal property of the plaintiff, but causes his estate generally to sustain a loss." But is this discrimination reasonable? If in the instance of water thrown back on to the property of a person by a dam wrongfully erected on the land of another, the word "trespass" in this act means "tort" or "wrong," so as to embrace the consequential injury, why should it not have the same broad sense with respect to the indirect injury inflicted by a neglect? Is it a reason or an assumption to say that the statutory expression of trespass to property, real or personal, means damage done to some particular piece of property, and not an injury to the property in general? If it is correct to translate the word "trespass" in this clause by the word "wrong," it seems impossible to resist the conclusion that a wrong to personal property is done as manifestly when one's personality in the aggregate is injured, as when some particular item of it is damnified. The fact is, the discrimination, taken at its best, would be but a vague and shadowy one, for it seldom, if ever, happens that a loss falls upon a person's general estate, except by means of an injury to some particular part of it. Thus, if A should destroy by his carelessness bank notes, the property of B, to the amount of \$1,000, under the rule suggested an action would survive; but if B lost these same bank notes through the deceit of A an action would not survive. The idea that the legislature intended to give transmissibility to the former of these actions and

not to the latter is absolutely not credible. This proposed test of the applicability of the statute, arising from the specialness of the wrong done, does not appear to be countenanced by the statutory language, and it certainly does not commend itself by its results. It requires the same word, standing in a clause of a statute, to have a two-fold meaning, being broadened in its application to one set of facts, and narrowed in view of another set, and occasions an action to survive in one class of cases and to non-survive in another, where the loss suffered in each is in substance of the same character, and where the necessity for redress in the one is equal to that in the other. The exigency should be pressing indeed that should lead to the adoption of such a rule.

The fact is, the real question to be solved is whether these causes of this act are to be construed strictly, or with the utmost latitude of interpretation, in view of its being a remedial act. In the case of *Ten Eyck v. Runk*, the latter course was pursued, and it seems to me that method was strictly correct. This law was plainly intended to take the place, in an improved and amplified form, of the statute of Edward III, ch. 7, *de bonis asportatis in vita testatoris* and its purpose was to remove the same absurdities that had crept into the law by a technical adherence to the words rather than to the spirit of the old maxim, *actio personalis moritur cum persona*. This substitute, and its anti-type, are obviously *in pari materia*. The statute of Edward applied, according to its letter, only to goods carried away in the life-time of the testator, but by most liberal construction it was extended to remedy many other wrongs, some of which are referred to in the opinion in *Ten Eyck v. Runk*, and it would not be consistent with customary rules, I think, to refuse to exercise a like liberality in the interpretation of this substituted act. By ascribing to the terms "trespass" the signification of tort, or wrong, and which is one of its meanings, the remedy is made approximately commensurate with the evil to be eradicated, and in this way actions for deceits and neglects will survive, as well as those in which the loss follows immediately from the tortious act. The language of the act is comprehensive enough for this purpose, and it is hardly permissible to impute a lesser design to the legislature, for there is great incongruity in a plan that imparts the quality of survival to an action for a forcible injury, and which withholds the same quality from an action for a neglect, or deceit. The one class of wrong is, in general, no more culpable than the

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other, and the injurious results, in some cases, are identical in each. If a physician should intentionally inflict a wound on his patient, the action, it is clear, would, by force of the statute, survive; and, surely, if the same wound were occasioned by want of skill, or carelessness, the same result should obtain.

And it is with respect to the class of cases illustrated by the example just adduced, that the counsel of the defendant interposes another objection to the rule of construction above indicated. The point is strongly pressed and it is this: "That in that class of cases in which, at common law, a loss sustained may be considered at the option of the party injured, as the consequence either of a breach of duty or of a breach of contract, it could not have been the intention to bring such class within the operation of this act. The reason assigned for this contention is that the person injured can sue the personal representative of the person inflicting the loss, for the breach of the contract, and consequently there was no necessity for legislative intervention. Thus it is said, and said with truth, that upon general principles the culpable attorney or physician may be sued either for the breach of the implied contract, which obliges him to the exercise of skill and care, or in tort for a breach of duty with respect to the same particulars; and from this it is argued that as the former action will survive at common law, it is not to be supposed that it was the design uselessly to endow the latter with a similar vitality. But the cases presented in the commencement of these remarks deprive this contention of almost all its cogency, for those cases show that the remedy that survives against the representatives of a deceased promise-breaker, in this class of cases, is one that is most incomplete, for no damages can be recovered in such suit, except such as have directly diminished the estate of the deceased. As an illustration, it appears in these cases that if a personal injury is occasioned by the negligence of a carrier, in a suit by the administrator of such person injured, in an action *ex contractu*, which is the only one the common law keeps alive after the injured person's death, the only damages recoverable are those that go to the impairment of the estate, and that there can be no compensation claimed for personal suffering. Such a redress is so imperfect that it can raise up no implication against a legislative design to keep alive the concurrent remedy for the tort, which is somewhat adequate, if not absolutely complete.

The above rule of construction which I have indicated should be adopted receives countenance from the views of the English courts, expressed with reference to the correct exposition of the statute of 3 and 4 Wm. IV, ch. 42, § 2, an act which, with respect to the point now in question, bears considerable similarity to the clause of the statute now being considered. That act provides that an action may be "maintained against the executors or administrators of any person deceased for any *wrong* committed by him in his life-time to another in respect to his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death," etc. The important inquiry in the present connection is, what interpretation was put upon the expression "wrong" with respect to property, real or personal.

This provision was considered in its bearing upon the case of *Morgan v. Ravey*, 6 Hurl. & Nor. 265, which was an action in *assumpsit* against the executors of an innkeeper, for breach of his implied contract to keep safely the goods of a guest. The question mooted was whether the law would imply a contract under the circumstances, but the court said: "It is not, however, necessary to determine this if the plaintiff elects to amend, which he may do, and we think successfully; because it seems to us, notwithstanding the ingenious argument of Mr. Phinn, that if the claim against the defendant is for a tort, it is for a 'wrong committed' within the meaning of the 3 and 4 Wm. IV, ch. 42, § 2." The counsel of the defendant, in his brief, appears to consider this also a case of "direct injury to specific property," but I am not able to draw any sensible line of discrimination between the consequential loss of goods arising from a neglect, and the consequential loss of a sum of money by the same means. The decision seems to me to be much in point, and is entitled to much weight.

The same statute entered somewhat into the consideration of the case of *Powell v. Rees*, 7 Ad. & El. 426, and the general tendency of this decision is in the same direction with the rulings in the judgment just cited; and it has also this particular importance in our present inquiry, that it rules that this statute of William applies to that class of cases, before referred to, in which, at common law, the remedy is concurrent, by an action *ex contractu* or *ex delicto*.

But I think the observation and decision of the court in the case of *Erskine v. Adeane*, L. R., 8 Ch. App. 756, are more to our present purpose. There a claim was made by a land-owner against the

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executors of a deceased tenant for life, for injury to his cattle by reason of the negligence of the deceased with respect to certain yew trees, in providing insufficient fences, and for throwing the cuttings on the plaintiff's land. The cattle in question were poisoned by eating of the yew trees and the cuttings thus exposed to them. Thus it appears the gravamen of the claim was for the consequential damages resulting from the negligence of the deceased. It was held that, while it was evident such an action would not have lain at common law, it could be brought at any time within the period limited by the statute of William. This judgment rests upon the ground that the neglect in question, and which resulted in the loss of the cattle, was a wrong to personal property within the sense of those terms in the statute, and it is, in consequence, plain that this judgment is of much authority in our present investigation, unless a difference can be established, with respect to principle, between a loss of particular cattle by a neglect, and the loss of particular moneys from the same cause. I cannot perceive such difference.

In Massachusetts a literal interpretation has been put upon the statute of that State upon this subject, a result which may, in a degree, be accounted for by the peculiar frame of the act, which is in the nature of an enumeration of the classes of cases in which actions shall survive, and which enumeration would, upon admitted principles, tend to contract the scope of the general terms used in the subsequent part of the section.

The judgment, I think, should be for the plaintiff in the present case. *Judgment accordingly.*

IRONs v. WEBB.

(12 Vroom, 208.)

Deed — reservation of timber — condition.

A deed of lands reserved the timber, the grantee stipulating that the grantor should have two years to remove it. *Held*, that it might be removed after that time. (*See note, p. 197.*)

PROVER. The plaintiff conveyed to the defendant, by deed dated January 23, 1875, "Excepting and reserving the timber on the said land being conveyed, for the removal of which the said

party of the second part agrees to and with the said party of the first part that he, the said party of the second part, will give two years from the date hereof to the said party of the first part." The trees were cut down by plaintiff within the two years, but a part was not removed by the plaintiff from the premises within the two years. The defendant, after the expiration of that time, removed the same upon his other premises adjoining, and converted the same to his own use.

J. W. Carmichael, for plaintiff.

Joel Parker, for defendant.

BEASLEY, C. J. The plaintiff founds his action in this case on the proposition that the timber in controversy was conveyed to him in an absolute form and clear of all conditions, and that the subsequent clause in the deed, restricting to the period of two years his right to enter upon the premises to remove such timber, had no effect on his title, either to limit or otherwise condition it. In opposition to this, the contention of the defendant is that the plaintiff, by the right construction of the conveyance, became entitled only to such of the timber as was removed by him from the premises within the period designated.

My examination of this subject has led me to the conclusion that the construction of this conveyance claimed in behalf of the plaintiff is correct. Upon looking at the frame of this instrument, it will be found that the timber in question is plainly excepted out of the operation of the conveyance, and that the right to take it away within a specified time is in the shape of an agreement on the part of the defendant. Such a stipulation on the side of the grantee of the deed cannot convert an absolute exception into a conditional one. The legal effect of an exception is to sever from that which is granted that which is excepted, so that the latter does not pass by the grant (*Shep. Touch. 77*), and when, consequently, any thing is thus set apart and declared to be outside of the grant, it should be plain words only that should bring it within the force of the grant. The excepting clause says, in effect, that the grantor withdraws from the grant a certain portion of the premises, and such act is so positive and emphatic that it cannot be controlled or affected by subsequent expressions or stipulations of dubious mean-

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ing or uncertain effect. It is not questioned that an exception may be made to depend, either for its existence or continuance, on a condition, the proposition alleged being that ambiguous phrases and vague expressions are not the materials with which such conditions are constructed. In the present case, if the contention of the defendant is right, then this timber continued to be the property of the plaintiff up to the running out of the two years, and then, by its non-removal, it became forfeited and passed to the defendant; and it is entirely obvious that such a condition is not favored in law, and that it will not be raised up by implication, unless by the force of demonstrative indication. Looking at the terms of the present agreement and its subject-matter, I can see no mark, certainly no decisive mark, signifying that it was the intention of these parties that by the plaintiff's neglect to remove the timber it should be forfeited to the defendant. Such a purpose, it is certain, is not contained in any part of the language of the instrument, for it nowhere says that, in any event, the title to the timber is to pass to the grantee. As a consequence, as it is not in the words, such a right must be derived by inference from the nature of the transaction itself. But, then, what feature of the business is to have such an effect? The only particular relied on is the circumstance that if the timber was permitted to remain on the premises until the time of removal had expired, it became unlawful to enter for the purpose of taking it away. But the effect of such an incident is not in law to work a forfeiture of title. Such a position of property is not uncommon. Chattels are frequently placed, or left, by their owner, on the land of another without his permission, but it will scarcely be pretended that by so doing, the title to such chattels becomes vested in the proprietor of the land. In such case, the land-owner has an adequate remedy for the wrong suffered by him: he is entitled to be indemnified for all the loss he may have sustained by having had his land illegally burdened by chattels placed there without right, and in consequence of the entry to remove them; and in this way, instead of by the exorbitant method of a forfeiture of such chattels, the law applies to the case its ordinary measure of damages, and thus gives compensation. Such was the standard of redress used by the Supreme Court of New Hampshire in adjusting the damages against a vendee of timber, who had entered on the land after the period given him in which to take off such timber, the applied principle being that the damages

should not include the value of the wood in question, but only the loss inflicted on the vendor by the breaking and entering his close. *Plumer v. Prescott*, 43 N. H. 277. And this, it seems to me, is the extent of the right of the vendor of this timber after the time for its removal had elapsed; he could have called the vendee to account for leaving it on the land beyond the stipulated time, and for all damages to his land done by its removal after such period, but he had no right to claim such timber as his own, and to put it to his own uses.

As far as my research has extended, I find that all the best considered cases that are strictly in point harmonize with the view of the subject above expressed. One of the chief cases is *Heit v. Stratton Mills*, 54 N. H. 109; s. c., 20 Am. Rep. 119. In that case it appeared that there was a deed conveying growing trees to be removed by the grantee, and it was held that as the terms of the grant, taken in their literal and usual sense, signified an absolute conveyance of the title of the trees, the grant was not made conditional by the implied stipulation that the grantee should remove the trees within a reasonable time. It will be observed that the case is closely applicable, as it is not possible to discriminate a sale of standing timber alone, without the land, from an exception of such timber in a deed conveying the land, with respect to the legal effect of a clause, appended to each, requiring within a time, specified or implied, the removal of such timber. It is manifest that if the stipulation touching the removal will not make the title conditional in the one case it will not in the other. The case of *Knott v. Hylinck*, 12 Rich. 314, must be considered as resting on the same basis, for the court construed a deed that reserved all the growing timber as leaving the title absolutely in the grantor, and although in that case there was no time mentioned within which the trees were to be removed, that circumstance can take but little from the force of the precedent, as undoubtedly, in the absence of an express limitation of a period for the disincumbering the land by the removal of the trees, the law would imply an undertaking to produce that result within a reasonable term.

With respect to the cases cited in the brief of the counsel of the defendant, I do not think any of them are exactly pertinent. The case that is most nearly so is that in *Holton v. Goodrich*, 35 Vt. 19, but a careful scrutiny of the report will disclose the fact that besides a reservation of certain property, and the privilege of re-

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moving it within a certain time, there were a number of other stipulations, and that the court, without any consideration of the general principles involved, put its decision upon the evident design of the parties to the instruments then under examination, as exhibited in its peculiar expressions and provisions. There are some *dicta* in the case of *Pease et al. v. Gibson*, 6 Me. 81, that favor the views of the defense, but the case itself did not call for those expressions of opinion, and that such expressions were not well considered has, I think, been quite plainly shown by the criticism of them in the opinion already referred to, read in the case of *Hout v. Stratton*. Touching the other cases cited, I shall dispose of them by the remark that they seem to me, so far as legal principles are concerned, as standing entirely aside of the subject now under examination.

In forming the foregoing opinion, I have laid no stress on the fact that the timber in the present instance was actually cut down before the end of the time limited in the deed for its removal. This has been designedly done, as it is not perceived how such fact can add any thing to the force of the exception in the conveyance, in the way of fixing the title in the grantor. I have endeavored to show that the exception is unconditional; and if this be so, by its own efficacy it kept the title to the timber in the plaintiff; but if, to the contrary, the property in the timber was not to remain in the plaintiff unless the trees were removed within such period, then, very clearly, the mere felling of the trees would not satisfy the requirement of such condition.

The Circuit Court should be advised in conformity with the foregoing conclusion.

NOTE BY THE REPORTER — In *Pease v. Gibson*, 6 Me. 81, the grantee was to have two years to take off the timber. The court said: "To admit the construction given by the defendants' counsel, and consider such a permission as a sale of the trees, to be cut and carried away at the good pleasure of the purchaser, and without any reference to the limitation, in point of time, specified in the permit, would be highly injurious in its consequences. It would deprive the owner of the land of the privilege of cultivating it and rendering it productive, thus occasioning public inconvenience and injury; and in fact it would amount to an indefinite permission. The purchaser, on this principle, might, by gradually cutting the trees and clearing them away, make room for a succeeding growth, and before he would have removed the trees standing on the land at the time of receiving such a license or sale, others would grow to a sufficient size to be useful and valuable; and then the owner of the land would be completely deprived of all use of it. Principles leading to such consequences as we have mentioned cannot receive the sanction of this court." This was followed in *Howard v. Lincoln*, 13 Me. 122. Both cases seem to have directly involved the point.

In *Hilton v. Goodrich*, 35 Vt. 19, there was a reservation of stone in a deed, with the

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privilege of taking it off "till" a certain day. The court said: "If the property was removed by that time, it belonged to the plaintiffs; but if not removed by that time their right to it was gone. This seems to be the natural and obvious construction of the deed."

Boisaubin v. Reed, 2 Keyes, 323; s. c., 1 Abb. Ct. Dec. 161, was not noticed in the principal case nor in the New Hampshire cases. It was a suit to enjoin an entry on land and the carrying away of timber. The deed granted all the growing timber on certain land, and the right of entry and occupancy "for and during the term of ten years for the purpose of cutting and taking and carrying away said timber and manufacturing timber on said land," etc. The Supreme Court, on the authority of the two Maine cases, and *McIntyre v. Bernard*, 1 Sandf. Ch. 52, and *Warren v. Leland*, 2 Barb. 622, had held that this was only a sale of such timber as was actually removed within the specified term, and granted the injunction. This holding was now affirmed in the Court of Appeals. The court said: "After the expiration of the term, every entry upon the land for the purpose of taking timber away was without the license of the deed. Had there been no term named, the vendee would be entitled to enter and carry away timber for a reasonable time, which would have depended for its limit upon the facts of the case; as to the amount of the timber; the extent of the land; the natural impediments to be overcome in removing it; and other attending circumstances. But to hold to the continuation of the right to remove the timber from the land, after the term for so doing has been agreed on by the parties, and has expired, is to disregard their agreement, or to make a new one. Every entry upon the land by the defendant, to carry away timber or logs, after the expiration of the term, was an entry without license, and a clear trespass, and if he or his servants carried away timber, the plaintiffs could be made good for the injury committed only by damages to the extent of the value of the timber removed. These facts indicate clearly, to my judgment, that it was the intention of the parties to the original agreement to limit the right to take and carry away timber to the term within which the vendee or his representatives might lawfully enter upon the land; and that the vendee has no title to the timber by cutting logs and leaving them upon the land; but to complete his title he must also remove the logs within the term." See *Heflin v. Bingham*, 56 Ala. 566; s. c., 28 Am. Rep. 774.

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(12 Vroom, 208.)

Criminal law — conspiracy to slander.

A conspiracy to slander is indictable

INDICTMENT for conspiring, by means of false and malicious charges, to injure and defraud D., and to cause him to be regarded as dishonest and a thief. The overt acts laid were that the defendants reported that D. was a thief, and had dishonestly obtained merchandise, and made false affidavits that he was dishonest and had fraudulently obtained from E. merchandise, in such way as to make it stealing. Motion to quash.

C. Parker, for motion.

A. B. Woodruff, for the State.

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BEASLEY, C. J. The principal objection to this indictment that was urged on the argument is, that taking the pleading at its best, it alleges nothing more than a conspiracy to defame a person by the propagation of a slander; and it was insisted that the wrong thus charged was a civil injury, and not a criminal offense. But the rule of law thus assumed to exist is not only unsupported, so far as has been discovered, by any authority, but is opposed by several direct decisions, and is inconsistent with the general legal theory of the subject. The cases on this head heretofore settled by this court are, with respect to the legal principle underlying them, entirely at variance with the rule here contended for. *State v. Donaldson*, 3 Vroom, 151; *State v. Cole*, 10 id. 324. Indeed, it may be said that a combination, formed with a view to cause a person to be suspected of having committed an indictable offense, is much nearer to the original ground upon which, in the old books, criminal prosecutions for conspiracy are based, than were the combinations in either of these reported cases. There are strong indications that originally the definition of conspiracy did not include any thing more than confederacies to charge falsely a person with criminality. Thus Lord COKE describes the offense as "a consultation and agreement between two or more, to appeal or indict an innocent person falsely and maliciously, whom accordingly they cause to be indicted or appealed; and afterward the party is lawfully acquitted by the verdict of twelve men." Blackstone also seems to regard the offense to be confined to a malicious accusation. 4 Bl. Com. 136. There are several cases in the Year Books that favor the same limitation. And in fact, this species of indictment was the remedy for the same wrong, considered in its criminal aspect, for which an action for a malicious prosecution was the remedy, considered in its civil aspect. It is much in this light that the subject is treated in Jacob's Law Dictionary, tit. "Conspiracy," and in Hawk. P. C., b. 1, ch. 72, § 2. But the doctrine was soon expanded beyond this limit, and among other cases, it was held that although no indictment had been found, or even though no complaint had been laid before a magistrate, and the only object appearing was to destroy the reputation of an individual, a prosecution for conspiracy could be maintained. This was the ruling by Lord MANSFIELD in the case of *Rex v. Parsons et al.*, 1 Blacks. 392, the facts in proof being that the defendants had conspired to take away the character of one Kempe, and accuse him of murder

"by pretended conversations and communication with a ghost that conversed by knocking and scratching in a place called Cock Lane." The report of the case does not show that any thing was done by the confederates beyond spreading reports defamatory of the person who was the object of their malice.

The present indictment is, I think, in the direct line of the precedents, as it is a slander imputing an indictable offense, the alleged endeavor of the confederates being to bring the prosecutor under the suspicion of having been guilty of theft. *Reg. v. Best*, Salk. 174; *Rex v. Kimberley*, 1 Lev. 62; *Reg. v. Best*, 2 Ld. Raym. 1167.

In the brief of counsel of the defendant, I find the text-book of Mr. Gabbett (1 Crim. Law, 252) quoted and much relied upon. This author has reviewed this subject with evident care and acuteness, and it seems to me that his conclusions are in direct opposition to those that are necessary to sustain this defense. This is his ultimate deduction from the authorities. "Conspiracies," such is his language, "to injure or destroy the reputation of others have in several cases been held to be proper subjects of an indictment, and the fair result of these cases appears to be that the mere conspiracy to slander a man will not be sufficient, but there must be combined with it the imputation of a crime, by either the temporal or ecclesiastical court, or else an intent by means of such false charges to extort money from the party."

From this citation, it seems to me that it is manifest, that in the opinion of this ingenious writer, in order to bring a conspiracy to slander a person, *per se*, within the category of indictable offenses, the slander designed to be propagated must be of a particular nature — that is, it must include the imputation of an offense punishable either by the temporal or spiritual courts. As the object of the present confederacy was, as laid in the indictment, by means of "false, wicked and malicious charges" to cause the prosecutor to be regarded as a thief, it would seem that the present proceeding, by the test proposed, would be justified. It is true that the counsel of the defendant, in his explication of this proposed rule, advances the view that it requires something more to make up an indictable conspiracy than a design to impute an indictable offense, such supposed super-addition being that the charge should be so specific as to jeopard the person slandered, by subjecting him to the risk of a criminal prosecution. But this is an interpolation into the rule of

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a matter foreign to the text-writer just quoted, as well as to the authorities, for it is not perceived that there is any indication to such a purpose in any of the decisions.

With respect to the objections to the mode of laying the overt acts, it suffices to say that they appear to spring out of the false theory that the office of such averments is to show a complete performance of the scheme of the conspirators. The statute does not exact that a full execution of the conspiracy shall be shown, the requirement being merely "that some act in execution of such agreement be done to effect the object thereof." The consequence is, this indictment is not defective in this respect.

The motion to quash must be denied.

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(12 Vroom, 281.)

Tax warrant—priority over execution.

A tax warrant delivered to the collector before an execution delivered to the sheriff, but not levied until after levy under the execution, has priority over it.

THE facts appear fully in the opinion.

W. J. Magie, for Evans.

B. A. Vail, for assignee.

L. Lupton, for city of Rahway.

VAN SYCKEL, J. This is a contest for priority between three creditors of William J. Walsh.

Evans obtained judgment by confession against Walsh, October 18, 1878, upon which execution was issued and levy made upon the personal property of the defendant, October 25, 1878.

The city of Rahway caused a tax warrant to be issued for unpaid taxes against Walsh, on the 14th day of October, 1878, by virtue of which the receiver of taxes levied on the same personal property which had been taken under the *fi. fa.* in favor of Evans, after the *fi. fa.* had been levied.

On the 18th of November, 1878, Walsh made an assignment of his property under our statute, for the equal benefit of his creditors.

[Omitting a minor consideration.]

This narrows the conflict to the question whether a tax warrant issued and delivered to the collector before a *fi. fa.* is delivered to the sheriff, but not levied until after the levy under the *fi. fa.*, shall have priority over it.

No preference can be claimed for the State, or for municipal corporations over other creditors since the decision of the Court of Appeals in *Freeholders of Middlesex v. State Bank at New Brunswick*, 3 Stew. 311, in which it was held that the State does not possess the crown's common-law prerogative to have its debts paid in preference to the debts of other creditors.

The writ of *extent* by which the debts due the crown were collected, and the *levari facias* by which taxes were made, prevailed over the subject's execution, unless the property levied on was actually sold before the teste of the king's writ, only by reason of the royal prerogative which entitled the crown debt to preference. *Rex v. Wells*, 16 East, 278; *Brassey v. Dawson*, 2 Str. 978; *Giles v. Grover*, 9 Bing. 128; *Hutchinson v. Johnston*, 1 T. R. 729; *Butler v. Buller*, 1 East, 338; 2 Tidd's Pr. 1053.

The question at issue must, therefore, be determined according to the rule which applies between ordinary creditors.

The tax warrant was delivered to the city collector before the Evans execution was delivered to the sheriff. The sheriff made the first levy, but before he sold under the execution the property was levied on by virtue of the tax warrant.

At common law the *feri facias* had relation to its teste, and bound the defendant's goods from that time, so that if the defendant afterward sold the goods, though to a *bona fide* purchaser for value, they were still liable to be taken in execution, unless sold in market overt.

To remedy this mischief, the statute 29 Charles II, ch. 3, § 16, was passed, of which our statute Rev., p. 392, § 18, is substantially a copy.

This statute did not contain the provision in the twentieth section of our statute, which protects *bona fide* purchasers from the defendant in execution, before actual levy.

Whether, as between two execution creditors, the lien of the

execution attaches upon personal property from the levy, or from the time of the delivery of the writs to the officers, is a question which has not been adjudicated in this State.

Under the construction given to the English statute, the sense in which, and the extent to which, goods are said to be bound by the delivery of the writ is that it binds the property as against the defendant himself, and all claiming under him, but it does not so vest the property in the goods as to defeat the title acquired by the purchaser at a sale thereof, made by the sheriff under an execution subsequently delivered but first levied and executed upon the property.

In *Smallcomb v. Cross*, 1 Ld. Raym. 251, it was resolved by all the judges that if two writs of execution are delivered to the sheriff the same day, he has not an election to execute which he pleases, but he must execute that which was first delivered. But if the sheriff levies goods in execution, by virtue of the writ last delivered, and makes sale of them, the property of the goods is bound by the sale.

In *Hutchinson v. Johnston*, 1 T. R. 729, ASHHURST, J., says: "The general principle of law, which has not been contradicted by any of the cases cited, is that the person whose writ is first delivered to the sheriff is entitled to priority, and that the goods of the party are bound by the delivery of the writ. But the legislature saw the inconvenience and hardship which would fall upon innocent purchasers if the vendee of the second writ were liable to be dispossessed of the goods which he had *bona fide* bought, and therefore they guarded against it by the statute." In this case it was held that the execution first delivered must have priority, although the seizure was first made under the subsequent execution.

In commenting upon *Smallcomb v. Cross*, in the case of *Payne v. Drew*, 4 East, 523, Lord ELLENBOROUGH says: "The sense in which, and the extent to which, goods are said to be bound by the delivery of the *fi. fa.*, is that it binds the property as against the party himself, and all claiming under him, but does not so vest the property in the goods as to defeat the effect of a sale made by the sheriff under an execution subsequently delivered;" and approving of the declaration of Lord HARDWICKE that neither before the statute, nor since, is the property of the goods altered, but continues in the defendant until execution executed, he declares that where there are several authorities equally competent to bind the

goods of a party when executed by the proper officer, that they shall be considered as effectually and for all purposes bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed. Lord ELLENBOROUGH admitted that the case of *Hutchinson v. Johnston* seemed to be against his view, and he attempted to distinguish it by saying, that in that case, both writs were delivered to the same officer, while in the case before him the writs were delivered to different officers. The declaration in *Hutchinson v. Johnston* was not necessarily involved in *Payne v. Drew*, nor was the question made which execution would have been entitled to the fruits of the sale. The case was this : a sequestration issued out of chancery, and was not executed for eighteen months, and after that time a *fi. fa.* was delivered to the sheriff, under which he seized the defendant's goods, and then receiving notice of the sequestration, the sheriff returned the *fi. fa. nulla bona*. An action was instituted against the sheriff for a false return, and the suit was properly maintained.

The English cases sustain the title of the purchaser at the sale under the execution which is first levied, on the ground stated by Chief Justice HOLT, "that sales made by the sheriff ought not to be defeated, for if they are, no man will buy goods levied upon a writ of execution," but there is no case which my research has found in which it has been held that the fund arising from the sale must be applied to the writ last delivered, because it is first levied.

The sale under a *fi. fa.* was evidently regarded as equivalent to a sale in market overt.

Archbold states the law to be that where two executions are delivered to the sheriff, and he, contrary to his duty, executes the second writ first, the sale will be valid, but where he merely seizes under the second execution, and then, before any sale is actually made of the defendant's property, seizes under the first, the first writ shall have priority. 1 Arch. Pr. 285.

In *Rex v. Wells*, 16 East, 278, the property was held to be so far bound by the delivery of the writ that as between subject and subject the question of priority is determined, but as against the crown it is not bound at all so as to defeat an *extent*.

In *Giles v. Grover*, 1 Cl. & Fin. 72, Justice PATTERSON, in his assertion "that Lord KENYON was mistaken in saying that as to

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tween conflicting executions priority was to be determined by the order of their delivery to the officer," misapprehended both *Payne v. Drew* and *Smallcomb v. Cross*, which he cited in his support, for in neither of those cases was the question necessarily involved whether the court would appropriate the proceeds of sale to the writ first delivered, or which writ as between the execution creditors themselves was entitled to priority in payment. This was one of the cases in which the English court manifested a strong disposition to maintain the royal prerogative, and the decision of the case in favor of the crown has ever since been followed. In the same case (*Giles v. Grover*) Justice ALDERSON cites *Hutchinson v. Johnston*, with approbation, and says that *Rybot v. Peckham*, referred to in the note to 1 East, 731, is an express authority to the same effect; he also declares that prior to the statute of frauds, if a subject's writ of execution had come to the sheriff after seizure, but before sale, under a writ of a subsequent teste, the sheriff would have been justified in executing it before the other writ under which he had seized, and would have been liable to an action on the case if he had omitted to do so. The only question in the case was when a *fi. fa.* was so completely executed as to prevent an *extent* from overreaching it, and Justice PATTESON was speaking with reference to such full and complete execution as would alter the title to property so as to defeat the operation of an *extent*.

In *Jones v. Atherton*, 7 Taunt. 56, it was expressly decided that though a sheriff make a seizure of goods under a *fi. fa.* last delivered to him, yet the plaintiff in a *fi. fa.* first delivered is entitled to be first satisfied out of the fruits of such seizure.

In *Field v. Milburn*, 9 Mo. 492, the English cases I have referred to are cited in support of the declaration, that as between execution creditors, it is not the date of the execution nor its delivery to the officer, but the date of the levy, which gives priority of lien, and the Court of Appeals of Kentucky, in *Tabb v. Harris*, 4 Bibb, 29, said that the inference from these cases was strong that this view was correct. The English cases, however, I think, establish nothing beyond the proposition that if the goods are first seized and sold by the officer under a junior execution, the purchaser will acquire a good title, and that unless the goods are actually sold under the last writ before the first writ is levied, the writ first delivered must be first satisfied. So Lord Chief Justice TINDALL understood the cases, in his opinion in *Giles v. Grover*, 1 Cl. & Fin. 190.

This rule, which was strongly adhered to by the English courts to protect *bona fide* purchasers at judicial sales, is not inconsistent with the right of the plaintiff in the senior writ to have his debt first satisfied in the distribution of the fruits of sale.

This view was adopted in New York, where the statute of Charles II is re-enacted, in *Lambert v. Paulding*, 18 Johns. 311. The execution first delivered was held to be entitled to the proceeds of the sale of chattels made under a subsequent execution by virtue of which they were first levied upon, although, as stated in the later case of *Marsh v. Lawrence*, 4 Cow. 461, this remedy would fail, and the first execution creditor would be left to his action alone against the sheriff for negligence, if the money was paid over to the junior execution creditor before application to the court to make an appropriation of the proceeds of sale.

The courts in Missouri and Kentucky argued that the plaintiff who procured the first levy to be made should have the benefit of his diligence, but the force of that argument is not apparent when it is considered that the plaintiff can do nothing after he has delivered his writ. He should not suffer from lack of diligence in an officer over whom he exercises no control.

So far as any expression of opinion has been given in our own courts on this subject, the inference is strong that the writ first delivered is entitled to priority of payment, provided it is levied before its return.

The law is clearly stated by Justice DRAKE in *Lloyd v. Wyckoff*, 6 Halst. 218: "A general or special property in goods is necessary in order to maintain the action of trover. Does the mere delivery of an execution vest that special property, or must there be also a levy for this purpose? The goods are said to be bound from the delivery of the writ. But how bound? Not so as to make a levy unnecessary, but so as to enable the sheriff, at any time before the return of the writ, to levy on them to satisfy his writ. By the receipt of the writ the goods become so far bound as to enable him by proper diligence to acquire a special property, but it is the service of the writ by which that special property becomes vested in him. By the common law the goods were bound from the teste.

By the statute, that binding (as far as respects *bona fide* purchasers) is delayed until delivery, but neither before the statute nor since is the property of the goods altered, but continues in the de-

defendant in execution until the execution is executed. The lien of the writ will continue only until the return of the writ."

It is by reason of the peculiar nature of the lien acquired by the mere delivery of an execution, that it follows that the sheriff has no such special property until actual levy and inventory as will enable him to maintain trover. The lien acquired by the delivery is inchoate, and becomes perfected by actual levy. If no levy is made before the return of the writ, the goods of the defendant are free from its burden, either in the hands of a purchaser with notice, or as to subsequent execution creditors. But if the levy is made, the lien dates from the delivery of the writ so as to maintain its rank against all intermediate incumbrances. Therefore no such title vests in the sheriff by mere delivery of the writ as will maintain trover, for it may be that he will not pursue and perfect his right by making a levy, but when the levy is duly made the writ binds the property by the doctrine of relation from its delivery.

In *Moss v. Thomas*, 2 Dutch. 124, the sheriff, holding a *fi. fa.*, made a levy upon part of the defendant's goods, and afterward, before the writ was returnable, levied upon other goods, and his title to the latter goods was held to be paramount to that of an assignee under an assignment made prior to the second levy. Justice ELMER said, "That no rule of law forbid the sheriff from seizing part of the goods at one time and part at another. By the common law a *fi. fa.* bound the property from its teste. Under our statute it binds the property from the time it is delivered to the sheriff; the writ was delivered to the sheriff long before the date of the assignment, and bound all the property the defendant had at any time before the return day."

In *Clement v. Kaighn*, 2 McCarter, 47, where the question was, which of two rival executions should have priority as against real estate, Chancellor GREEN, in commenting upon the tenth section of the act of December 2d, 1742 (1 Nevill, 279), which directs that where there are sundry writs for the sale of real estate, such priority shall be given as the law gives in case of executions against personal estate, said, "That then as now executions bound personal estate from the time of the delivery thereof to the sheriff."

Judges of such eminent ability and accurate knowledge of the common law would not have asserted so broadly that the execution binds from its delivery, if, as between conflicting executions, no lien is acquired by delivery to the officer.

Chief Justice HORNBLOWER did not so understand the rule, for in *Richards v. Morris Canal and Banking Co.*, Spenc. 136, where the execution first delivered had been stayed by rule of court before it was levied, he gave it priority of payment out of the moneys made under a subsequent writ, saying that the execution, though not levied, continued to be a lien upon the property until it was sold, and that the lien followed the proceeds into the sheriff's hands.

In *James v. Burnet*, Spenc. 635, Justice WHITEHEAD says, "The goods of a defendant in execution are bound from the delivery of the writ to the sheriff, and continued up to the time of the levy."

With such a continuing lien, and the duty resting on the officer to make the levy, it seems difficult to perceive upon what rule of construction it can be held that the lien may be defeated by a junior execution securing the prior levy. The natural and reasonable interpretation of the language of our statute is in favor of the earlier writ. Our courts have uniformly said that the execution binds personalty from the time of its delivery, and if so, in what way does a subsequent execution displace that lien? There is nothing in the language of our statute to justify such a result.

The clause at the close of the eighteenth section, which was not in the statute of Charles II, enforces this view: "If two or more writs of execution shall be delivered against the goods of the same person on the same day, that which was first delivered shall be first executed and satisfied." This manifests a clear intention that the lien acquired by delivery shall prevail between two executions delivered on the same day, and there is an absence of all indication of a purpose to apply a different rule as to executions delivered on different days.

An intention to make the actual levy the test between rival executions would have been expressed as it was in the case of executions issued out of the court of small causes by the sixty-sixth section of that act.

This controversy will therefore turn upon the question whether the same rule applies between an execution in the sheriff's hands and a tax warrant. Does the delivery of the tax warrant bind the property if followed by a levy? If it does, the tax warrant should, in the distribution of the fund now in court, be first satisfied.

No question is made as to the title of the purchaser at the sheriff's sale. The tax collector claims that in the equitable appro-

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privation of the proceeds of sale, the court must regard the prior lien of his writ.

The tax warrant is the means provided by law for the collection of the revenue due to the State, as well as that which is to be applied to the maintenance of the local government, and it is reasonable to presume that it was intended that it should have at least the virtue and efficiency of an execution by which the claims of an individual are enforced. Giving it that force, it is not necessary to consider whether it is within the operation of the eighteenth section of the act respecting executions, because it was delivered before the rival execution reached the sheriff's hands. While the doctrine has been established in this State, that it has not so far succeeded to all the prerogatives of the British crown, that there is the same priority of right here, in respect to the payment of taxes; which existed at common law in favor of the public treasury, it would be an unfair discrimination against the State to hold that the writ which the legislature has provided to enforce the payment of the duties essential to the support of its government shall not have the force and incidents which belong to the ordinary process provided for the citizen.

The tax warrant, being the execution provided to enforce the payment of the public revenue, should, in the absence of any language in the tax law evincing an intention to impair its efficiency, be accorded the force of an execution in ordinary cases. This will entitle it to be declared a lien upon the personal property of the defendant within the city of Rahway from the time at least of its delivery to the officer, and that lien having been perfected by a levy according to the command of the warrant, before the sale under the sheriff's execution, the public duty should be satisfied before the payment of the sheriff's execution.

Public policy requires this construction of the law.

If the tax warrant acquires no lien until it is levied, its usefulness will be greatly impaired, and its purpose in many cases defeated. In a populous district, where it issues against a great number of persons, it would require so much time to make a levy in each case that many executions would unavoidably intervene to deprive the public of its revenue.

It would be a race between the tax collector and the various officers to whom executions are delivered, in which the former would be placed at great disadvantage.

It could not have been the legislative design to create an agency so feeble for a purpose so vital.

Mr. Burroughs in his work on Taxation (p. 256) says that whether there be a tax warrant placed in the hands of the collector or the tax list is merely delivered to him, when it is in his hands in the mode pointed out by the statutes of the State, it has all the force of an execution issued from a court upon a judgment regularly obtained.

In *Sheldon v. Van Buskirk*, 2 N. Y. 473, it was held that the collector, under his tax warrant, had the power to sell which he would have had under an execution, in the absence of any statutory prohibition.

The liability imposed upon the collector for the taxes ordered to be made by his warrant, by section 23 of the tax law (Rev., p. 1144), shows that the legislature did not intend to arm the officer with a process which would leave him impotent to discharge the duty imposed upon him.

My conclusion is that the tax is entitled to priority in payment.

COOLEY V. PERRINE.

(19 Vroom, 323.)

Agency — to sell — authority to warrant.

An agent appointed to sell a horse is not thereby authorized to warrant.

THE following case was agreed upon :

The appellees, the plaintiffs below, brought suit against the appellant, as defendant, to recover on a note of \$75, dated August 11th, 1875, made to order of Jabez B. Cooley, payable three months after date. Jabez B. Cooley died after the making of the note and before it came due. The note was part consideration on sale of a horse to defendant, Perrine, as below stated. To this action the defendant set up as defense that the horse was warranted sound at the time of the sale. and that he was not sound at that time. The appeal was tried before a jury at May term, 1878.

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The horse was in fact sold by one Joseph Woodward, to the defendant, who, at the time of the sale, told the defendant that the horse was all right. The only testimony as to the authority of Woodward in respect to this sale was that of Woodward himself, who testified that at the time of the sale he had been in the employ of Mr. Cooley some seven or eight years; that Mr. Cooley was engaged in carrying on the lumber and coal business at Elizabethport, and was not a horse dealer; that Mr. Cooley had sold only two or three horses during the time witness was in his employ, and then only when the horses were not suitable for his work or not needed for present service; that witness had never before sold a horse for Mr. Cooley; that at the time of this sale Mr. Cooley was confined to his bed by sickness, which resulted in his death; that defendant several times talked about buying a horse, and then talked about buying another of Mr. Cooley's horses, and finally desired to purchase the horse sold him by witness; that from the stable witness and defendant went to Mr. Cooley's house; that Mr. Cooley was so sick that defendant could not see him; that witness went into Mr. Cooley's room and told him that the defendant wanted to buy this horse; that Mr. Cooley was not at first disposed to sell him this one; he wanted to sell one of the other horses; he then told witness to sell him to the defendant; the price was fixed at \$150. This was the only authority witness had to sell, and says that he, witness, could not have sold him without Mr. Cooley's express authority to do so; that having received this direction to sell, he sold the horse to the defendant for the price named; that he told the defendant the horse was all right. But witness now says that Mr. Cooley had not directed or authorized him to make any representations in reference to the horse, or to warrant him. He did not tell Mr. Perrine this at the time of the sale, nor did he tell him that he had any authority to warrant. There was no other evidence as to the authority of Woodward in respect to this sale.

These facts were uncontroverted.

There was no proof that either Mr. Cooley, in his life-time, or his executors, before the death of the horse, ever had any knowledge of the representations made by Woodward.

The court left it to the jury to determine, from this evidence, whether or not Joseph Woodward had been made, or was acting as, such an agent as to bind his principal by his representations or warranty.

The court also charged "that where goods are sold for a definite price, and there is no warranty, either express or implied, and no fraud in the sale, the vendor will be entitled to recover the full price, even if the article is defective to such an extent as to diminish the value."

The court further charged that if the jury found from this evidence that Joseph Woodward was acting as the agent of Mr. Cooley, and that said Woodward has received authority from said Cooley to warrant said horse, and did warrant said horse as claimed by the defendant, and that said horse was unsound at the time of sale, and was not as represented by said Woodward, then it would be the duty of the jury to find for the defendant.

Counsel for appellees requested the court to charge that "the servant of a private owner, intrusted to sell and deliver a horse on one particular occasion, is not, by law, authorized to bind his master by a warranty; the buyer, therefore, taking such warranty, takes it at the risk of being able to prove that the servant had in fact his master's authority for giving it." The court refused so to charge, or to charge differently from charges already made. To which counsel of appellees excepted.

Exceptions were allowed accordingly.

Geo. F. Parrot, for plaintiffs in *certiorari*.

P. H. Gilhooly, for defendant in *certiorari*.

DIXON, J. If, in this case, Woodward was any thing more than a messenger, he was clearly only a *special agent*, *i. e.*, one constituted for a specific act and under an express power.

As to such an agent, it is settled that he does not bind his principal unless his authority be strictly pursued, and those dealing with him are chargeable with notice of its extent. *Dunlap's Paley's Agency*, 202; 2 *Kent's Com.* 620; *Story on Agency*, §§ 21, 126; 1 *Am. Lead. Cases*, 560, note.

To determine, therefore, whether what Woodward did bound his constituent, his instructions, which are the basis of his authority, must be examined; what is embraced within their legal scope, he could do on behalf of his employer; what is not, he could not so do.

His instructions were to sell a certain horse to a designated person at a fixed price. Herein the only term subject to any appearance of ambiguity or indefiniteness, was the direction to *sell*. But I think

that also is sufficiently definite in the law to relieve the present inquiry from difficulty. A sale of a chattel is a transfer of its title by the vendor to the vendee for a price paid or promised. 1 Pars. on Cont. 519.

A direction to sell, therefore, nothing more appearing, would confer upon a special agent no authority beyond that of agreeing with the purchaser in regard to these component particulars.

Under certain circumstances a sale legally imports more than these particulars, and in such cases the authority under a power to sell would be correspondingly enlarged. Thus, if a sale be made by sample, it is thereby impliedly warranted that the bulk is of as good quality as the sample. Hence it has been properly held that where a broker was empowered to sell goods which were in bulk, and, by the custom of brokers, it was permissible to sell such goods by sample, and he was not restricted by his instructions as to the mode of sale, his sale by sample, and the warranty of quality therein implied, were binding upon his principal. *The Monte Allegre*, 9 Wheat. 648; *Andrews v. Kneeland*, 6 Cow. 354; *Schuchardt v. Allens*, 1 Wall. 359.

But in a sale of a horse, subject to the buyer's inspection, no warranty of quality is implied, and it seems a short and clear deduction of reasoning thence to conclude that in an authority to make such a sale, no authority so to warrant is implied. The warranty is outside of the sale, and he who is empowered to make the warranty must have some other power than to sell. Accordingly, in *Brady v. Todd*, 9 C. B. (N. S.) 592, the court directly decided that the servant of a private owner, intrusted by his master to sell and deliver a horse on one occasion, is not, *by law*, authorized to bind his employer by a warranty of quality, but to do so, authority in fact must be shown. The significant circumstances of that case were precisely like those in this, and Chief Justice ERLE points out the soundness, both in law and policy, of the rule there applied.

The case of *Fenn v. Harrison*, 3 T. R. 757 (1790), which is a leading case, illustrates the true principle. There the defendants directed H. to take a negotiable bill of exchange to market and get cash for it, but stated that they would not indorse it. It was held that H. could not make a contract to bind the defendants to pay the bill. On a second trial (s. c., 4 T. R. 177), it appeared that the only direction to H. was to get the bill discounted, and upon this the court decided that H. could bind the defendants by in-

dorsement. The purpose of the defendants, in both cases, was to authorize a transfer of the bill; the law recognized two methods of doing this— one by mere delivery, the other by indorsement. The instruction “to get the bill discounted,” or “to get cash for the bill,” was broad enough to include both methods of transfer, but the limitation shown on the first trial, “that the defendants would not indorse the bill,” necessarily confined the agent to the transfer by delivery. On both trials the court bounded the power of the agent by his express authority; but when, on the second trial, it appeared that within his authority, he had chosen to transfer by indorsement, the liability legally incident thereto attached to his principals.

A remark of ASHHURST, J., in the case just cited, and two cases tried before Lord ELLENBOROUGH, have given rise to some decisions and more numerous *dicta* in opposition to the views above expressed. ASHHURST, J., said, in illustration of the difference between a general and a particular agent, “I take the distinction to be that if a person keeping livery-stables, and having a horse to sell, directed his servant not to warrant him, and the servant did, nevertheless, warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant; but if the owner of a horse were to send a stranger to a fair, with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment.” This remark lends some countenance to the idea, which however it does not directly assert, that an authority to sell, given even to a particular agent, embraces an authority to warrant in the absence of an express exclusion.

In *Helyear v. Hawke*, 5 Esp. 72 (1803), Lord ELLENBOROUGH said, “I think the master having intrusted the servant to sell, he is intrusted to do all he can to effectuate the sale, and if he does exceed his authority in so doing, he binds his master.” As no warranty was shown in this case, it did not become necessary to apply the doctrine thus announced.

In *Alexander v. Gibson*, 2 Camp. 555 (1811), the same learned chief justice declared that if the servant was authorized to sell the

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horse, and to receive the stipulated price, he thought he was incidentally authorized to give a warranty of soundness; that it was most usual, on the sale of horses, to require a warranty, and the agent who is employed to sell, when he warrants the horse, may fairly be presumed to be acting within the scope of his authority. In this case the plaintiff called the servant as a witness, who swore that he was expressly forbidden by his master to warrant the horse, and there was no other evidence as to his authority, yet because the warranty by the servant was proved, the plaintiff recovered on the warranty against the master.

For these *dicta* and decisions no authority is cited. Chief Justice ERLE says, in *Brady v. Todd*, *ubi supra*, that he understands these judges to refer to a general agent employed for a principal to carry on his business of horse dealing. Certainly if the ruling in *Alexander v. Gibson* had regard to a particular agent, it has not been followed to the extent to which it was there carried. No other case holds that such an agent could bind his principal by a warranty expressly interdicted. But to the extent of holding that a special agent might warrant if not forbidden, these observations have formed the foundation of some judicial assertions and adjudications.

The earliest case I find in this country is *Lane v. Dudley*, 2 Murph. 119 (1812); 5 Am. Dec. 523, where TAYLOR, C. J., citing the substance of ASHHURST'S illustration, says an authority to warrant a horse is within the scope of an authority to sell. The decision itself turned on a ratification.

In *Skinner v. Gunn*, 9 Port. 305 (1839), it is said "an agent employed to sell a horse may warrant him to be sound, that being usually done in such cases." The suit was on a warranty of a slave, but failed for want of proof. *Fenn v. Harrison*, *Helyear v. Hawke*, and *Alexander v. Gibson*, *ubi supra*, are the only cases cited.

Following this are *Gaines v. McKinley*, 1 Ala. 446, and *Cocks v. Campbell*, 13 id. 286, on warranty of soundness of slaves, and *Bradford v. Bush*, 10 id. 386, on warranty of the age of a horse.

In *Exell v. Franklin*, 2 Sneed, 236, it was held that authority to sell a slave gave authority to warrant soundness, citing *Fenn v. Harrison*, but no case of special agency; and in *Tice v. Gallup*, 2 Hun, 446, it was decided that a special agent, authorized to sell a horse, might warrant its age and the cause of its apparent lameness, by virtue of his agency to sell, unless forbidden so to do by his principal. The only case cited for this position is

Nelson v. Cowing, 6 Hill, 336, which, however, supports it by a *dictum* only.

These are the only cases I have found wherein it has been decided that an authority to a special agent to sell embraces an authority to warrant quality. Resting, as they all do, either directly or indirectly, on *Fenn v. Harrison*, *Helyear v. Hawke*, and *Alexander v. Gibson*, they no longer have any foundation on authority, since these three cases, if they ever applied to a special agency, are now, in that respect, distinctly overruled by *Brady v. Todd*, *ubi supra*; a decision foreshadowed by CRESWELL, J., when, in *Coleman v. Riches*, 16 C. B. 104, 113 (1855), he asked counsel, citing 2 Camp. 555, "would you hold that to be good law at the present day?" and clearly approved as correct in principle in *Udell v. Atherton*, 7 H. & N. 170.

Nor have they any better basis on principle than on authority. Their underlying principle is said to be that the agent, being empowered to sell, is intrusted with all powers proper for effectuating the sale, and a warranty of quality is both a proper and a usual power for that purpose. If by this were meant that the agent is intrusted with all powers proper to the making of an effectual sale, its accuracy could not be questioned. Undoubtedly his authority extends to whatever is proper to be done in fixing the price, and the time and mode of payment, and the time and mode of vesting the title and delivering the chattel. All these things are incident to the sale. But if the expression mean that the agent is intrusted with all powers convenient for the purpose of inducing the purchaser to buy, even to the extent of enabling him to make collateral contracts to that end, then I think it is in violation of the settled rule that the special agent must be confined strictly to his express authority, and is in opposition to well-considered and authoritative decisions. For example, it might very much facilitate the sale if the agent could indorse the vendee's note for the purpose of raising the money to pay the price, and such an exercise of power would jeopardize the principal no more than would a sale on credit, and very much less than might a warranty of quality; and yet I imagine that a special agent could not make such an indorsement binding on his employer, for in *Gulick v. Grover*, 4 Vroom, 463, the Court of Errors held that even a general agent had no authority so to indorse, to enable his principal's debtor to borrow money to pay the debt. So in *Upton v. Suffolk County Mills*, 11

Cush. 586, it was adjudged that even a general agent for the sale of flour could not warrant that it would keep during a voyage to California. And in *Bryant v. Moore*, 26 Me. 84, a warranty of oxen by a special agent empowered to exchange was held invalid against the principal. Likewise, in *Lipscomb v. Kitrell*, 11 Humph. 256, it was decided that an authority to sell a claim confers no authority to guarantee it — that such a guarantee is not a necessary incident of the sale ; and a similar conclusion was reached as to bank stock, in *Smith v. Tracy*, 36 N. Y. 79.

Undoubtedly there are many cases where it has been held that a general agent to sell might warrant quality. A general agent, Mr. Russell, in his treatise on Factors and Brokers, p. 75, defines to be either, first, a person who is appointed by the principal to transact all of his business of a particular kind ; or secondly, an agent who is himself engaged in a particular trade or business, and who is employed by his principal to do certain acts for him in the course of that trade or business. Such agencies extend, it is said, to whatever is fairly included among the dealings of that branch of business in which the agent is employed. But their scope arises not out of the instructions given, but out of those implied powers which the law confers, even in spite of instructions, because of which these are often called implied agencies in contra-distinction from special agencies, which are express.

Thus, in *Howard v. Sheward*, L. R., 2 C. P. 148, an agent of a horse dealer bound his master to a warranty of the quality of a horse sold, although directed not to warrant. Other cases of warranty of quality by a general agent are *Hunter v. Jameson*, 6 Ired. 252 ; *Woodford v. McClenahan*, 9 Ill. 85 ; *Milburn v. Belloni*, 34 Barb. 607 ; *Nelson v. Cowing*, 6 Hill, 336.

But it is utterly inadmissible to deduce from these instances of general agency, the existence of similar powers in special agents, between whom and general agents Dr. Story says it is very important carefully to discriminate. Story on Agency, § 21.

Nor do I see the propriety of asserting, as a matter of law, that a warranty of quality is a usual means of effecting the sale of a chattel by a private person, *i. e.*, one not a tradesman in the line of the sale, or that it is even a usual attendant upon such a sale. Such warranties may be as various as the qualities of the objects sold, and to determine, as by a rule of law, which are usual and which not, will involve the courts in discussions where the personal ex-

perience of judges must have more influence than legal principles. In every such case the question of usage should be regarded as one of fact and not of law.

Sometimes it has been intimated that a distinction might be based upon whether the warranty by the agent were set up by a plaintiff to maintain a suit against the principal, or by a defendant to resist the principal's suit for the price, and that the attempt of the principal to collect the price, after he has learned of the warranty, is a ratification of it. On the idea that the authority does not cover the warranty, and that the purchaser is chargeable with knowledge of the authority, it is not plain how he can withstand the vendor's claim on a contract made, by alleging a contract which he knew was not made. But if there be any thing at all in the distinction, it must be confined to those cases where, when the principal obtains knowledge of his agent's unauthorized warranty, the sale is *in fieri*, or can be declared void and the parties restored to their original position. What the principal does in pursuance of a bargain which he has authorized his agent to make, without knowledge that his agent has entered into an unwarranted contract, is not a ratification of such contract. *Coombs v. Scott*, 12 Allen, 493; *Smith v. Tracy*, 36 N. Y. 79; *Titus v. Phillips*, 3 C. E. Green, 541; *Gulick v. Grover*, 4 Vroom, 463.

And if, when he acquires knowledge, he cannot, in justice to himself, disavow the whole of his agent's contracts, he is entitled to stand upon what he authorized, and repudiate the rest; the purchaser, who dealt with a special agent without noting the bounds of his power, must suffer rather than the innocent principal. *Bryant v. Moore*, 26 Me. 84.

These views are not at all in conflict with the class of cases which hold that the principal is responsible for the fraud or deceit of his agent, committed in the course of his employment, for his employer's benefit. *Jeffrey v. Bigelow*, 13 Wend. 518; *Sandford v. Handy*, 23 id. 260; *Barwick v. Eng. Joint Stock Bank*, L. R., 2 Ex. 259; *Mackay v. Com. Bank of N. Brunswick*, L. R., 5 P. C. 394.

Those cases are well founded upon the principle that as every man is bound to be honest in his dealings with others, so is he bound to employ honest agents, whether they be general or special, and if in transacting his business, and within the range of their authority, they be dishonest, the consequences are legally chargeable to the employer, and not to a stranger. *Hern v. Nichols*, 1 Salk. 289.

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In the present suit, I think that the unauthorized warranty, inferred from the honest statement of the agent that the horse was all right, not communicated to the vendor or his representatives until after the horse was delivered to and had died in the possession of the vendee, formed no defense to the claim for the price, and that the appellee's prayer for instructions to the jury was justified by the facts and the law, and should have been granted. Its refusal was error, for which the judgment should be reversed with costs.

The cause may be remitted to the Common Pleas for a new trial.
Judgment reversed.

FERRY V. WILLIAMS.

(12 Vroom, 332.)

Mandamus — to permit inspection of public records.

A citizen who desires to inspect recommendations filed with the collector of taxes as the basis for issuing pending liquor licenses, in order to ascertain whether the provisions of the law have been observed, and to secure obedience of the law, is entitled to *mandamus* to compel the exhibition of such letters.*

APPPLICATION for *mandamus*. The opinion states the case.

J. H. Stone, for relator.

J. L. Blake and *J. Vanatta*, contra.

DIXON, J. By a supplement to the charter of the town of Orange, approved March 30th, 1875 (Pamph. L., p. 399, § 8), it was provided that no person should be allowed to sell ale, etc., within the city limits, unless he were first licensed by the collector of taxes, had paid a license fee, and had filed with the collector a letter of recommendation, signed by six legal voters and freeholders, who had signed no other recommendation within a year, to the effect that the appellant was of good moral character and of good repute

*See *Pumphrey v. Mayor* (47 Md. 145), 28 Am. Rep. 446, and note, 448. In *Wehber v. Townley*, Michigan Supreme Court, June, 1880, it was held that no one has a right, at common law, to a copy or abstract of the entire records of a public office, in which he has no special interest, but which he desires to obtain for speculative purposes.
— Rar.

for temperance. The relator in this case, a citizen of Orange, believing that the requirements of this law as to these letters of recommendation were not obeyed, and desiring, with other citizens, to secure a due observance of its provisions, applied to the collector of taxes for an inspection of the letters on which then existing licenses had been granted. The collector refused his request, and the common council, on appeal to them, approved of this refusal, and instructed the collector to persist therein. The relator now seeks a writ of *mandamus* to enforce his alleged right of inspection, and the collector denies that he has such a right.

Whether he has or not must be decided by general principles, since the statutes of the State are silent on the subject.

The documents in question are of a public nature, and the rule that every person is entitled to the inspection of such instruments, provided he shows the requisite interest therein. And as Lord DENMAN remarks, in *Rex v. Justices of Staffordshire*, 6 Ad. & El. 842, the court is by no means disposed to narrow its authority to enforce by *mandamus* the production of every document of a public nature in which any citizen can prove himself to be interested. For such persons, indeed, every officer appointed by law to keep records ought to deem himself for that purpose a trustee.

The relator asserts no interest to be subserved by an inspection of these letters, except that common interest which every citizen has in the enforcement of the laws and ordinances of the community wherein he dwells.

In England, the occasions which generally have required the exercise of the power of the court to enforce inspection of public documents, have been those where a party has sought evidence for the prosecution or defense of his rights in pending litigation. In such cases, when the custodian of the documents was a party in the cause, the court usually intervened by rule, otherwise by *mandamus*. But the existence of a suit was not a *sine qua non* for the exertion of the power. In *Rex v. Lucas*, 10 East, 235, a *mandamus* was sought to compel the steward of the manor to permit one claiming certain copyhold lands within the manor to inspect the court rolls and take copies. The lord, claiming himself to be the owner of the lands, resisted, on the ground that there was no cause depending; but the Court of King's Bench granted the writ, notwithstanding the opinion before expressed in *Rex v. Allgood*, 7 T. R. 746, Lord ELLENBOROUGH saying: "I do not know why

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there should be any cause depending in order to found an application of this sort. This is not the impertinent intrusion of a stranger, but the application of one who is clearly entitled to the copyhold, unless there be a conveyance of it by those under whom he claims; he may, therefore, well require to see whether there appears upon the rolls to be any such conveyance." So, in *Rez v. Tower*, 4 M. & S. 162, on a controversy, but without suit, between a tenant of the manor and the lord, as to cutting underwood, the court granted a *mandamus* to inspect the court rolls so far as related to that subject. Likewise in *Rez v. Justices of Leicester*, 4 B. & C. 891, a *mandamus* was granted that certain ratepayers be allowed to inspect and take copies of the proceedings and documents relating to the parish rates, although no suit was pending; and while this case is disapproved in *Rez v. Vestrymen of St. Marylebone*, 5 Ad. & El. 268, and overruled in *Rez v. Justices of Staffordshire*, 6 id. 84, yet in neither case is it suggested that it was erroneous because no action had been brought. The disapprobation turns upon the principle that the ratepayers had no interest to be subserved by the inspection, since no information to be obtained from the documents could aid them in the enforcement or protection of any lawful claim. Lord DENMAN saying, in the case last cited, that the subject-matter was not one which the ratepayer could bring before the court as a litigant, and hence there was not that direct and tangible interest which is necessary to bring persons within the rule on which the court acts in granting inspection of public documents. In *Rez v. Merchant Tailors' Co.*, 2 B. & Ad. 115, although a *mandamus* was refused to members of the company seeking an inspection of *all* the records, books, papers and muniments of the company because of the generality of the application, it was conceded by all the judges that if the application had been limited to some legitimate and particular purpose in respect of which the examination became necessary, it would have been allowed and that there was no rule that to warrant an order to inspect corporation documents, there must actually have been a suit instituted.

It seems, therefore, to be sufficient if the person seeking inspection has such an interest in a specific controversy as will enable him to maintain or defend an action, for which the public documents will furnish competent evidence or necessary information.

Nor is it essential that his interest should be private, capable of sustaining a suit or defense on his own personal behalf. It will

justify his demand for inspection, if he may act in such suit as a representative of a common or public right. The cases in England, in which a private subject has secured inspection of public or *quasi* public documents on the ground of being such a representative, are comparatively rare, because of the prevalence of the rule that the civil remedy for wrongs by which no private rights were peculiarly affected was usually in the name of the attorney-general acting on behalf of the public. But whenever the subject was, by reason of his relation to the common interest, permitted to litigate for its protection, the right of inspection was fully secured to him. Thus, in *Rex v. Shelley*, 3 T. R. 141, where some of the burgage tenants were testing by *quo warranto* the right of the defendant to be a burgess, a full inspection of the court rolls, not limited to the evidence of their own titles, was granted them. In *Rex v. Babb*, 3 T. R. 579, on an information by three aldermen to inquire into the right of Woolmer to be mayor of Great Grimsby, the relators had a rule for the inspection and copies of all the public books, records and papers of the borough of Great Grimsby regarding the subject in dispute. And in the cases of *Rex v. Justices of Leicester*, *Rex v. Marylebone*, *Rex v. Judges of Staffordshire*, and *Rex v. Merchant Tailors' Co.*, already cited, the appellants for inspection had no other interest in the matters involved than such as they shared in common with all the ratepayers of the parish or members of the corporation, but that was not even suggested as a ground for refusing the *mandamus*.

And indeed, upon the reason of the thing, if inspection of public documents will be granted to a private individual when he is seeking merely the furtherance of his own private ends, *a fortiori* should it be accorded to him when he is aiming at the accomplishment of a public purpose, as to which the courts will assist his design through a suit instituted by him in the public behalf.

If therefore we would recognize the right of the applicant to maintain a suit on behalf of the public, because of any such violation of or non-compliance with the charter on the part of the collector of taxes, as the relator seeks to discover through the inspection desired, then we should also recognize his right to the inspection, and enforce it by proper process.

The English rule, that the redress of wrongs, arising from usurpations and unlawful acts of public officers, which do not directly affect private persons or property, must be attained through the

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suit of the attorney-general, has not been generally followed in the practice of this State. Indeed it is not uniformly observed in the mother country. Judge COWEN, in *People v. Collins*, 19 Wend. 56, refers to several instances of its infringement. Naturally, from the more democratic character of our institutions, greater relaxation of the rule would be likely to obtain among us; and accordingly we find that, from an early period, our courts have exercised a large discretion in annulling the illegal acts of municipal bodies and officers, and compelling the performance of their public duties at the instance of citizens and tax payers who were not otherwise interested in the controversy than was the rest of the community, while the cases in which the attorney-general has interfered for such purposes are quite infrequent. In *State, Kean, pros., v. Bronson*, 6 Vroom, 468, it is said that in this State, the rule is modified only to the extent that a tax payer may bring into question the action of municipal authorities, if such action will subject him to a tax in common with his fellow citizens; and in *State, Montgomery, pros., v. Trenton*, 7 Vroom, 79, this limit of modification was adopted by a refusal of the court to set aside, at the instance of land-owners in the neighborhood, an illegal ordinance granting permission to lay a railroad across a street. Undoubtedly most of the cases where private citizens have sued to prevent or redress public wrongs of municipal authorities, are those involving conduct which would lead to expenditure of public moneys, and so increase taxation, but this has arisen rather from the usual character of such wrongs, than from any reason upon which a remedy would be afforded. There are certainly instances of interference by the courts with official action affecting only public rights at the suit of private persons, where questions of taxation were not at all concerned, or were so remote from the matters complained of as not to be noticed in the decision. Thus, in *State v. Justices of Middlesex, Coxe*, 244 (1794), the Supreme Court, on a *certiorari* prosecuted by some inhabitants of the county, set aside an election to fix a site for building a county court-house, when the sole ground of complaint was unfairness in conducting the election. *State v. New Brunswick, Coxe*, 393 (1795), the court allowed a *certiorari* to test the validity of a municipal ordinance, at the instance of a citizen, without proof that he was or would be peculiarly affected by it. In *State v. Grescom*, 3 Halst. 136 (1825), a *mandamus* was granted to a private applicant, directing a township committee to

assign to the overseers of highways in the township their several divisions of a public road then recently laid out ; and in *State v. Holliday*, 3 Halst. 205, the same relator obtained a writ directing the overseer to whom the road had been then assigned to open it for public use. In *State v. Snedeker*, 1 Vroom, 80 (1862), a citizen sued out a *certiorari* to set aside the action of surveyors vacating a highway, and VREDENBURGH, J., said : " Every citizen is interested more or less in every highway, and has a right to submit any questions affecting such interests to the court." In *State v. Common Council of Rahway*, 4 Vroom, 110 (1868), the council was ordered to appoint a special election to fill a vacancy in the board, on a *mandamus* issued at the relation of a resident of the ward unrepresented. In *State ex rel. Mitchell v. Tolan*, 4 Vroom, 195, it was decided that an inhabitant of a city has sufficient interest to support the right to file an information in the nature of *quo warranto*, testing the legality of an election of aldermen.

These cases seem to indicate that with us the exception to the rule is extended so far as to justify this court in acting by *mandamus*, *certiorari* or *quo warranto*, at the instance of private persons, for the redress or prevention of public wrongs by public bodies and officers, whose official sphere is confined to some political division of the State, whenever the applicant is one of the class of persons to be most directly affected in their enjoyment of public rights, and the public convenience will be subserved by the remedy desired. The general indifference of private individuals to public omissions and encroachments, the fear of expense in unsuccessful and even in successful litigation, and the discretion of the court, have been, and doubtless will continue to be, a sufficient guard to these public officials against too numerous and unreasonable attacks.

The present controversy relates to a matter of public police, of universally recognized importance, concerning a traffic which, in the opinion of many, largely adds to the disorders of society and the burdens of taxation ; and it cannot be alleged that private interests are not as much involved in its due regulation by law as they are in other public questions about which heretofore individuals have maintained a standing in this court. Hence, I think the relator, in his capacity of inhabitant and tax payer in the city of Orange, has such an interest in the proper observance of the provisions of the city charter for licensing saloons, that he may, under certain circumstances, litigate for its protection, and in order to

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ascertain whether those circumstances exist, being actuated by such motives as are disclosed in the present application, he is entitled to an inspection of the letters of recommendation, filed with the collector of taxes, upon which pending licenses were granted.

Let the *mandamus* prayed for be awarded.

ORDINARY OF NEW JERSEY V. THATCHER.

(12 Vroom, 408.)

Deed — delivery — escrow.

A deed cannot be delivered in escrow to the grantee or obligee. A guardian's bond, conditioned for execution by three sureties, was executed by two, who left it with the surrogate, instructing the guardian to have it executed by the third, which he promised to do. *Held*, that this was not a delivery upon condition, and therefore not an escrow, and the two were liable although the third did not execute.*

SUIT on a guardian's bond. The opinion states the facts.
Special verdict.

J. N. Voorhees, for plaintiff.

John T. Bird, for defendants.

BEASLEY, C. J. The first subject of inquiry in this case is, whether a guardian's bond, given in the common form to the ordinary, can be delivered in escrow to the surrogate of a county? The proposition is stated intentionally in this general form, so as to separate the question, for the purposes of the research, from the specialties of this particular case, and which specialties will be considered in another aspect of the discussion.

It has been frequently decided that a deed may be delivered in escrow to a co-obligor, even though such obligor be the principal bondsman. Such were the judgments in the leading cases in this State of *State Bank v. Evans*, 3 Green, 155, and of *Black v. Lamb*, 1 Beas. 108; 2 id. 455. In both of these instances the deed in question respectively was delivered conditionally to one of the co-obligors, and in each case the instrument was regarded as having

* See *Harkreader v. Clayton* (36 Miss. 383), 31 Am. Rep.

been well delivered in escrow. This same doctrine is maintained by such a multitude of authorities that it seems hardly open to controversy anywhere, and it certainly is at rest so far as concerns our own tribunals. It might, however, tend to misconception if this general statement of the legal rule should not be qualified by an intimation that there may be cases in which an obligor may, by his incaution, impart to the depository of the instrument delivered in escrow such an apparent right to pass it away in an unqualified form to the obligee, as to prevent such obligor from setting up the existence of a condition that was to have been complied with before such instrument became deliverable. This restrictive rule has been sanctioned by a number of the courts of this country, and has recently been enforced by the Supreme Court of the United States in the case of *Dair v. United States*, 16 Wall. 1, in which a bond perfect on its face had been executed by sureties and by them delivered in escrow to the principal obligor, and who had passed it over in the ordinary course to the government; the attempted defense was that the instrument had been placed with the principal obligor as an escrow, and had been delivered by him in violation of the condition imposed; but the court adjudged that as the principal obligor had been clothed with an apparent right to transfer the bond without qualification, and as the officer of the government receiving it, no matter how vigilant, would be unavoidably deceived by such conduct, the defense could not prevail. The decisions in the cases of *State v. Peck*, 53 Me. 284; *State v. Pepper*, 31 Ind. 76, and *Millet v. Parker*, 2 Metc. (Ky.) 608, are to the same effect.

From this explication it will be noted that the cases in this train proceed on the ground, not of a denial that a deed may be delivered by a surety in escrow to the principal obligor, but that an estoppel *in pais* may arise from the position of the circumstances; the consequence therefore is, that the principle thus introduced does not obtain unless the recipient of the bond is so situated as almost unavoidably to be misled, by the appearance of things, into the belief that the obligor in making delivery has the legal power to do such act. If there is in the affair any thing to put him on his guard, as for example, the indications on the face of such a bond as is now under consideration, which has not been executed by all the persons named in its body as obligors, the rule does not become applicable. Inasmuch, however, as the bond in the present case was not delivered by the sureties through any intermediate agency,

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but by their own hands, this doctrine of estoppel is not pertinent, and was alluded to only to avoid mistake with respect to the extent of the general rule that the co-obligor may hold the deed in escrow in behalf of the sureties.

As the surrogate received this bond from the sureties themselves, the only inquiry under the present head is, as to the legal status of that officer in an affair of this kind. Does he stand sufficiently aside of the obligation, so as to be capable of taking, for the benefit of the sureties, the bond in escrow; or does he, in its reception, represent, *simpliciter*, the obligee? Can this officer in such a matter be the agent of the surety, as well as the agent of the surrogate general?

My consideration of the subject has led me to the conclusion that the county surrogate is in this respect the agent of the ordinary alone, who is the obligee in the instrument. The procedure comprising the making of these bonds is this: A petition is presented to the Orphans' Court, praying for the appointment of a person nominated as guardian, and offering to have executed a bond with certain named sureties; the court assenting, a bond is prepared and given to the surrogate, who presents it to the court for approval and upon being passed, files it in his office. In form, the bond is between the guardian and his sureties of the one part, and the ordinary, or surrogate-general, of the other.

It is thus evident that unless the tradition of these bonds to the county surrogate be a tradition in law to the surrogate-general, they are not, in point of fact, passed to him at all. It seems to me therefore, that the county surrogate is, in this matter, the representative of his superior officer, and that therein his entire function consists in a right to accept a delivery of the bond. He has no authority to do more than this; he is not empowered to make any terms, or to assent to any conditions, in behalf of his principal and being a public officer, the extent of his ability is known to all persons dealing with him. The receipt of the bond on the part of the surrogate is a mere ministerial act, and in doing it he is the deputy of the ordinary. It is, too, an official act, and being a public officer, he cannot in such a transaction be the agent of an individual. In short, in my judgment, the surrogate-general receives this bond from these obligors by the hand of his subordinate and in point of law, the transaction consists of a delivery of the instrument to the obligee.

This being the situation, I think it follows unavoidably that this defense is invalid, for a deed cannot be delivered in escrow to the grantee, or obligee. Authorities may be found that deny or question this proposition, but I see not the least ground for saying that it has not always been one of the admitted canons of the common law. I am not aware that any English judge has ever doubted the prevalence of the rule. The doctrine is stated as established law, both in the Touchstone and in the Institutes of Lord COKE. In the former of these authoritative works the principle is stated in these plain words: "The delivery of a deed as an escrow is said to be where one doth make and seal a deed and deliver it unto a *stranger* until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed." And again, in a subsequent passage, this master of the common law says: "So it must be delivered to a stranger; for if I seal my deed and deliver it to the *party himself, to whom it is made as an escrow* upon certain conditions, etc., in this case let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and the party is not bound to perform the conditions; for *in traditionibus chartarum non quod dictum, sed quod factum, est inspicitur.*" Shep. Touch. 58, 59. And prior to this authority we find the same doctrine stated as settled law in the treatise of Perkins (p. 61), which Lord COKE, in the preface to volume X of his reports, tells us was "wittily and learnedly composed and published" in the reign of Edward VI. There are also a number of references to the doctrine in the Year Books. 14 Henry VIII, 28; 18 Henry VI, 42. And the following references will serve to show how extensively the existence of this legal rule has been recognized both by the English and American courts. Co. Litt. 36; *Thoroughgood's case*, 9 Rep. 137; *Whyddon's case*, Cro. Eliz. 520; *Blunden v. Wood*, Cro. Jac. 85; *Holford v. Parker*, Hob. 246; *Bushell v. Passmore*, 6 Mod. 218; T. Moore, 642; *Foley v. Cowgill*, 5 Blackf. 18; *Gilbert v. N. Amer. Ins. Co.*, 23 Wend. 43; *Den v. Partee*, 2 Dev. & Bat. 530; *Simonton's Estate*, 4 Watts, 180; *State Bank v. Chetwood*, 3 Halst. 1.

With respect to the authorities cited in the well-considered and learned brief of the counsel of the defendants, it is to be observed that most of them relate to cases in which the impeached instrument had been delivered on condition to a co-obligor or to a third

party ; and it will be found that in most of these decisions it is incidentally admitted that such a delivery cannot be made to an obligee. An exception to such current of authority is certainly to be found in the remarks of Judge CAMPBELL, in the case of *People v. Bostwick*, 32 N. Y. 445, to the effect that the rule that a deed cannot be delivered as an escrow to the party who takes the interest under it, has application only to the case of a deed of conveyance, and that it is such a deed alone that cannot be delivered to the grantee on condition, the reason being that in such case the estate vests, "which cannot be divested except by due process of law or by the voluntary execution of a deed by the grantee;" but there seems to be no reason to believe that this novel view was the ground on which the decision of the court was rested, for Chief Justice DEXTER, in the expression of his conclusions, without noticing the theory of his learned colleague, adheres to the accepted doctrine, and says, "certain principles are very well established ; where a deed is delivered to a party who is the *obligee or covenantee*, it is impossible to annex a condition to such delivery." Nor is it easy to understand why the grantee in a deed cannot receive such deed in escrow, if he can hold a bond under such circumstances, because, granting the capacity to become the depository of an escrow, it seems clear that by the conditional delivery of a conveyance to him the estate would not vest until the performance of the condition, any more than it would if such delivery were to a third person. But independent of such considerations, it seems to me quite out of the question, at this late day, to sanction a suggestion that stands in opposition to so much authority from the epoch of the Year Books to the present time.

I conclude, then, under this first head, that the deed in question was delivered, in legal contemplation, to the obligee in person, and that, consequently, it was not possible to attach any condition to such an act. Nor do I think that in answer to this it will suffice to urge, as is urged, that the delivery was not complete, because such a contention is obviously in the face of the facts. These sureties left this instrument in a completed form, so far as they themselves were concerned, with the surrogate, and they were to do no other act in regard to it ; and consequently, if the deed was not then delivered by them, they had no intention to deliver it. The true theory is, that a deed is delivered whenever it is intended that it shall go into effect by virtue of such delivery, without further

act on the part of the party making the transfer. For the purpose of this part of the inquisition, I assume that these sureties delivered this instrument to the surrogate, intending to deliver it, as they say, as an escrow, and using words expressive of such purpose; and from these premises I have concluded that the bond, by force of an imperative rule of law, passed to the obligee, detached from all extraneous conditions. The bond cannot, notwithstanding such expressed conditions, be treated as an escrow in the hands of such obligee.

In order to estimate fully the force of this position, it is necessary to bear in mind that the deed in question was, with respect to its legal effect, a perfect deed, so far forth as the defendants were concerned. The deed, it is true, nominated in its premises another person as an obligor, besides the parties signing in that capacity, but this did not make it less the finished act of those who did execute it. No one will pretend that if the signers of this deed had delivered it to the surrogate in its present state, without annexing any condition to its tradition, it would not have been binding in law. The decisions are uniform and numerous to that effect. The fact of the absence of the signature of a party named has no legal significance, except that it may, as a circumstance, tend to confirm, in a proper case, the contention that the deed was delivered in escrow, or may serve to put an obligee on his guard when he receives the instrument from the hands of the principal obligor, or of a third party, as to the authority of such agent to make delivery to him. In all other respects, the fact that the deed has not been signed by some of the persons named in it as obligors cannot impair the obligatory force of the specialty with regard to the persons executing it.

Before leaving the subject, I also remark that the rule which is above applied in this case is not, in my judgment, by any means a merely technical one. To the contrary, I regard it as a wise regulation, founded in public utility, and conducing greatly to the security of persons desirous of executing contracts in a definite and assured form. The law reasonably provides that the instrument delivered shall be conclusive, with respect to its contents, as to the intention of the parties to it; and in the same manner, and in view of the same considerations, the act of delivering the instrument should be equally conclusive. The danger to be apprehended from fraud and false swearing, as well as from the infirmity of human

memory would be as great in the one case as in the other. If a condition could be annexed to a delivery of a deed when made to the obligee himself, the very essence of the transaction would be left to depend on the memory and truth of the bystanders. I cannot but think that there is manifest wisdom in the old rule, that the law will regard in such transactions not what is said but what is done. Nor does it seem to be that such rule is ever, in any of its manifold applications, of more worth than when it is employed as a safeguard to persons who are of necessity represented by public officers. It must strike every one as a most alarming idea, that any of the numerous bonds that are given to surrogates and clerks can be defeated if it can be made to appear, by parol, that any of the parties executing and delivering such instruments stated to such officers receiving it that it was to be inefficacious unless upon the happening of some event. This present case would afford a fair illustration of the practical operation of such a pernicious principle. These parties themselves delivered this instrument into the hands of the surrogate, as a security of the estate of this infant; the surrogate, after it had been duly approved by the court, filed it in his office; and now after the lapse of many years, when it becomes necessary to resort to it, the property of the minor having been wasted by the guardian, the endeavor is to explode the entire transaction by showing, by the oaths of the parties interested, that the instrument is a nullity, as it was delivered subject to a condition that has not been fulfilled. In my judgment, law and public policy are in accord on this subject, both declaring that such a defense cannot prevail.

There is a second aspect of this case, but which also appears to me equally unfavorable to the pretensions of these defendants, for, on the assumption of the capability of the surrogate to receive a bond in escrow, I think it plain that the legal inference from the facts found by this special verdict must be that no such delivery was, in point of fact, made.

In disposing of this point, I premise that I admit, to its full extent, the rule of exposition that was adopted in the case of *Evans v. State Bank*, and which was reiterated in *Lamb v. Shreve*, that the question whether any given delivery is conditional or not is to be decided, not, as was at one time supposed, by a mere form of words or turn of expression, but from the intention of the parties, as manifested by their language and acts. As Chancellor SUGDEN

said, in the case of *Nash v. Flyn*, 1 Jones & La Touche, 162, "now it is quite settled that it is not necessary, in delivering an instrument as an escrow, to say that it is delivered as an escrow. I have always considered it as a clear point, that if the instrument be delivered upon condition, that constitutes an escrow." This is undoubtedly the reasonable and modern rule of construction applicable to these transactions. Nevertheless, in handling this question at the present time, there are two considerations which we must carry with us, the first being that we have to do with a special verdict, and in the second place, that we must find, in order to make the defense available, that the delivery was conditioned with a stipulation that the instrument should not go into effect unless a certain act should be performed.

This verdict has not found the point, that the transfer of the deed was subject to any terms; all that it does is to ascertain certain facts, and the inquiry, therefore, is as to the legal value and effect of such facts. In the exposition of findings of this character, the rule is that when the facts found are of such a nature that clear conclusions can be drawn from them, it is no objection to the finding that the jurors themselves have not drawn such conclusions and stated them as facts. This is the theory denoted by Chief Justice DALLAS, in *Monkhouse v. Hay*, 8 Price, 256, and is in accordance with the practice in such cases as appears from Mr. Tidd's Manual, page 897. If the circumstances presented have so uncertain a tendency as to leave the mind in doubt as to their legal effect, then indeed the court cannot make any deduction. Bearing in mind, then, the two-fold office to be performed, viz., that a conditional delivery must be found, and that only necessary conclusions are to be deduced from established facts, I will turn to the merits of this case as they are spread upon this record.

The circumstances touching the execution of this bond are these:

Lucy C. Wilson was a minor, under the age of fourteen years, and her mother petitioned the Orphans' Court of the county of Hunterdon to appoint Robert Thatcher her guardian, offering John B. Alpaugh, Jacob Thatcher and William Riley as sureties on his bond. This petition being approved, a bond was, according to the practice, conformably drawn by the surrogate in the names of the guardian and his three proffered sureties. The record then narrates the occurrences touching the execution and delivery of this instrument, in these words, to wit:

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"And that on the said 20th day of March, 1868, the said Robert Thatcher and William S. Riley went into the said surrogate's office for the purpose of signing said bond, when the said bond was read over to them by the said surrogate, and the contents thereof made known to them; that thereupon the said Robert Thatcher and William S. Riley signed the said bond, in the presence of the said surrogate, and that immediately after the said William S. Riley and Robert Thatcher had signed the said bond, the said William S. Riley, in the presence of the surrogate, said to the said Robert Thatcher, 'Now you bring in the other parties, and see that they sign the bond,' and that the said surrogate then and there also said something to the said Robert Thatcher, in the presence and hearing of the said William S. Riley, about his bringing in the other parties to sign said bond; and at that time the said William S. Riley knew that Joseph C. Smith, who drew the said petition and said bond, and in whose presence he signed the same, was the surrogate of the said county of Hunterdon; and that said bond was then left with said surrogate, in the surrogate's office of the county of Hunterdon; and that on the following day the said Robert Thatcher and the said Jacob Thatcher, mentioned in said bond, went into the said surrogate's office that the said Jacob Thatcher might sign said bond, and that the said surrogate produced said bond and read it over to the said Jacob Thatcher, in the presence of the said Robert Thatcher, whereupon the said Jacob Thatcher signed the same. After the said bond was signed, the surrogate immediately said to the said Robert Thatcher, in the presence and hearing of said Jacob Thatcher, 'Now you send John B. Alpaugh in to sign the bond,' which the said Robert Thatcher promised to do; and that said bond was then left with said surrogate, in the surrogate's office of the county of Hunterdon.

"And that the said bond contained the names of said Robert Thatcher, William S. Riley, Jacob Thatcher and John B. Alpaugh, as they are now written therein, before either of the parties thereto signed the same, and when the same was read over to each one of them, and the contents made known, and that there were affixed thereto by the said surrogate, before the said parties or either of them had signed the same, four seals, as is represented in said copy."

Now this testimony, as I construe it, shows this and nothing more, that both these sureties who signed this bond believed that

it would be signed by the third surety, and they had the promise of the principal obligor that he would procure the signature of such third surety. But such belief, founded on such promise, does not manifest or constitute a conditional delivery of the instrument. Neither of these sureties intimated by word or act that in case of the failure of the other party to sign, the bond was to be inefficacious with respect to himself. Whether either of them would have said so if the question had been propounded at the time is a matter left in the utmost uncertainty. Now each says, and no doubt is fully convinced, that he would not have agreed to execute the obligation without this third party assuming a share of the risk; but who can say confidently that such was his opinion or intention at the time of the transaction? And even if we were satisfied that such at the time was their intention, we must remember that the existence of such intention alone would not absolve them from this obligation, for it must also appear that such intention was manifested to the officer receiving the bond. Was the surrogate then given to understand that unless the third signature was obtained the bond was to be a nullity? In order to conceive clearly the point of inquiry, it is necessary to bear in mind that a promise of the principal obligor to do some act in the future as an inducement to the surety to sign, and the non-fulfillment of such promise, will not in the least degree impair the validity of the obligation delivered in reliance on such promise. To have such effect it is requisite that it should be stipulated that the bond is not to come into existence as an obligation until the performance of such promise. The correct doctrine on this subject is stated perspicuously by the court in the case of *Evans v. Gibbs*, 6 Humph. 405, in these words: "It is incumbent on him who alleges it [the deed] to be an escrow merely, and not his deed, to prove affirmatively, not that the principal promised something further should be done, by way of inducement to his execution of the instrument, but that the performance of such further act was the condition upon which he was to become bound, or the instrument to be delivered as his act and deed." In the case in hand, the principal obligor promised the sureties to bring in the third bondsman to sign, but plainly neither of such executing sureties made the performance of that promise the condition on which he was to become bound. To the same purpose is the case of *Cumberlege v. Lawson*, 40 E. L. & Eq. 228, in which the defendant pleaded that "he executed the in-

denture on the *faith* that P. (one of the sureties) should join therein, and who never did execute it;" the court holding the plea bad, CRESSWELL, J., saying, "The defendant does not say that he never did seal and deliver; nor that he delivered the deed as an escrow, on condition that P. should execute it." And in *Bowker v. Burdskin*, 11 M. & W. 127, it is similarly obvious that the deed was executed under the influence of the same kind of inducement, because in that case the deed of assignment, in its body, purported to be the deed of three members of a firm, and to convey all their personal estate in trust for creditors; but the contention that the instrument was delivered as an escrow was rejected, Baron PARKE remarking: "It seems probable the partners contemplated that the other partners should execute the deed, but in the mean time, this party has set his seal and delivered the deed as an instrument which conveys all the property he has." That the mere expectation or well-founded belief, of the party signing, that another party will sign, will not make a delivery by the former conditional on an execution by the latter, appears also from that numerous line of cases in which deeds have been pronounced valid, which, upon their face, manifest that it was expected that other parties should sign. *Duncan v. United States*, 7 Pet. 435, and *Cutter v. Whittemore*, 10 Mass. 442, are leading cases of that class, and they are founded on the radical distinction which exists between an understanding, contemporaneous with the delivery of a deed, that something further is to be done as a part of the transaction, and an understanding that the doing of such thing is to be a prerequisite to the legal existence of the instrument. Chancellor WILLIAMSON has clearly discriminated in this respect, in the opinion read by him in the case of *Black v. Lamb*, 1 Beas. 118, where he says: "There is a manifest difference where the testimony is offered for the purpose of showing that the writing was not to be delivered until a condition precedent was performed, and that it was delivered with an agreement that the condition was to be performed." In the present case, as presented in this record, I can find no facts from which, as a matter of reasonable certainty, an inference can be drawn that there was an understanding that the present bond should have no legal effect until the signature of the third surety should have been obtained. Nor can I think that, in transactions of this kind, if it is to be held that the surrogate can stand as the depository of an escrow, the law should be satisfied with any thing short of the most

convincing proof that the transfer of the instrument to the official hand was conditional. It is easy for the party to speak plainly on the subject, if such is his intention, and in an affair involving the estates of persons, who, from the immaturity of their minds, are incapable of taking care of their own concerns, he is bound to do so. The passing of an instrument into the possession of the party taking an interest under it is an act so significant of the right of such recipient to take and enforce it according to its terms, that to control such manifestation, circumstances or expressions amounting almost to demonstration should, in my opinion, in all cases be exacted. There is no reason to believe that if, in the present instance, these defendants had in any intelligible manner intimated to the surrogate that they were not to be bound by this bond until it was executed by the other surety, it would ever have been made use of or tendered for judicial sanction. The consequence is, that if the matter is left in doubt as to the character of the delivery of this instrument, such doubt should be resolved in favor of the innocent person, to secure whom the bond was given, rather than to the advantage of these defendants, whose carelessness has at all events produced the situation.

The cases cited in the brief of the counsel for the defense have been carefully examined and considered, but most of them appear not to be upon the point where the stress of the case lies, for they relate to the effect of deeds left in the hands of a co-obligor, or of a third party, to be vitalized on the performance of a condition clearly expressed. *Pawling v. United States*, 4 Cr. 219; *Ward v. Churn*, 18 Gratt. 801, and a large number of others, which are referred to, do not differ in any material degree from that of *Evans v. State Bank*, which rests upon incontestible law. The decision in *Fletcher v. Leight*, 4 Bush, 303, is nothing but the exposition of a local statute, and *Clements v. Cassilly*, 4 La. Ann. 380, is an offshoot of the civil and not of the common law. The case of *Sharp v. United States*, 4 Watts, 21, is more pertinent, but appears to have been decided upon little consideration, as none of the authorities are referred to, and the decision is put upon a principle that is inconsistent with almost all the authorities upon this subject. With respect to the case of *Evans v. Bremridge*, 8 De G., M. & G. 100, which seems to have been much relied on, as it is referred to several times, it is a judgment plainly adverse to the defense, as the instrument then in question was admitted to be good at law, as

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appears by the report of the case in 2 Kay & Johns. 174, where Vice Chancellor Wood is recorded as saying : "So here the deed is good at law. Not having delivered the deed upon condition of its being executed by the co-surety, the plaintiff is bound at law to pay the amount ; but the question is, what is the effect in equity?" It is true that in that case, which arose on a bill in chancery, relief was afforded founded on grounds that do not seem to be present on this occasion ; but with such equities, it is obvious, at this time, we have no concern.

With respect also to the fact adverted to by counsel, that this bond was executed in view of the order of the Orphans' Court sanctioning a bond by three named sureties, it does not appear to me to be a circumstance having any legal force. The court certainly, by reason of such direction, was not precluded from changing its purpose, or from accepting a bond signed by a lesser number of sureties ; nor could the existence of such original order qualify in any measure the act of these defendants in making delivery of this instrument ; such order, as part of the transaction, may indeed tend to show what they expected would be done, but it does not help to explain what in point of fact they themselves did.

I think the plaintiff is entitled to judgment on this special verdict.

Judgment affirmed.

MANUFACTURERS' NATIONAL BANK OF NEWARK V. DICKERSON.

(12 Vroom, 448.)

Surety — bond for faithful performance — change of principal's duties.

A bond was executed for the faithful performance of duty by an "assistant clerk" in a bank. He was employed as a messenger. Afterward he was promoted to the next higher clerkship, and still later to the position of book-keeper. In the last position he was stationed near the money-drawer, and from time to time abstracted money from it, and made false entries to conceal his crime. The last promotion was without the knowledge of his sureties on the bond. *Held*, that they were not liable for the embezzlement. (See note, p. 242.)

DEBT. The opinion states the facts.

Joseph Coult, for plaintiff.

F. H. Lum, for defendants.

WOODHULL, J. This action was brought to recover the penalty of a bond, dated April 30th, 1873, given by the defendant, Dickerson, as principal, with Sieb and Bea as sureties, in the penal sum of \$5,000, conditioned that whereas the said Dickerson had been appointed an assistant clerk of the said bank, therefore, if the said Dickerson should in all things, while he should be in the employ of the said bank as such assistant clerk, faithfully perform his duties as such assistant clerk, then the bond to be void.

The cause having been tried at the Essex Circuit without a jury, is certified to this court for its advisory opinion upon the question, "Whether, under the evidence in the cause, Gottlob Sieb and John Bea, the sureties on the bond declared on, are released."

The material facts are these : Dickerson was first employed by the bank November 20th, 1872. From that time up to July 1st, 1874, as the younger of two assistant clerks, he held the lowest position in the bank. On July 1st, 1874, he was advanced to the position of second assistant clerk, and on February 15th, 1876, he was further advanced to the position of individual book-keeper, and took exclusive charge of the ledger of individual accounts. On his promotion, July 1st, 1874, his salary, which up to that time had been \$200 a year, was increased to \$360, and on his second promotion, February 15th, 1876, was further increased to \$500.

His duties in the first position were chiefly those of a runner or messenger. He took out drafts for collection, received for them money or checks, and charged the checks in the debit book. He had no proper access to either of the ledgers.

In the second position his principal duties were to charge the foreign checks in the journal ; to foot up that book at night to see that the debit and credit sides agreed ; to take charge of the city collection notes, and to assist in the correspondence. In the third position he was book-keeper, and had charge, as such, of the ledger of individual accounts, the individual debit book, the individual credit book and the discount book. He posted into the ledger the debits from the debit book, and the credits from the credit book ; he wrote up the dealer's pass books, and returned their voucher. His place as book-keeper was so near the money drawer, that in the language of the cashier, "it was a very easy thing, when the teller's back was turned, to take a \$100 bill, as that would be the

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nearest to him; the bills were arranged in order, \$1, \$2, etc., and \$100, the larger bills being to the right of the drawer; and it was a very easy thing to take a \$100 bill and alter the footing of the credit book."

Dickerson's embezzlements, beginning with \$100, April 27th, 1876, amounted to a large sum, and were concealed by means of false entries in the books which he kept after his second promotion. The sureties had no notice of the change made by the bank in his position and duties.

The question whether the defendants are released depends on the true construction of their bond, and the legal interpretation of the foregoing facts.

The rule of construction to be applied to contracts of suretyship, as stated in *Miller v. Stewart*, 9 Wheat. 680, is to the effect that the liability of a surety is not to be extended, by implication, beyond the terms of his contract; that he is bound only to the extent, and in the manner and under the circumstances pointed out in his obligation, and no further; that it is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit; that he has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal.

That a surety is not to be held beyond the precise terms of his contract is declared by KENT, J., in *Ludlow v. Simond*, 2 Cal. Cas. 1, to be a well-settled rule, both at law and in equity, and to be founded on the most cogent and salutary principles of public policy and justice. s. c., 2 Am. Dec. 291; *McMicken v. Webb et al.*, 6 How. 292; *Bowmaker v. Moore*, 7 Price, 223; *Smith v. United States*, 2 Wall. 219; *McClusky v. Cromwell*, 11 N. Y. 593.

Resulting from the principles just stated is the familiar rule that the surety is discharged if, without his consent, the principal parties make a new agreement inconsistent with the terms of the original agreement, or in the mode of performing them. Theobald on Principal and Surety, 119 (1 Law Lib., vol. LXX); *Whitcher v. Hall*, 5 B. & C. 269; Pitman on Principal and Surety, 166 (Law Lib., vol. XL).

From the same principles results also another rule, still more closely applicable to the case before us, namely, that when there is a bond of suretyship given for an officer, and by the act of the obligee the office is materially changed, so as to affect the risk of the surety, the bond, as to him, is avoided.

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In *Pybus v. Gibb*, 6 E. & B. 902 (88 E. C. L. 88), a bond was executed by G. and two sureties, conditioned for indemnifying the high bailiff of a county court against liabilities for the misconduct in office of G., who was appointed by the high bailiff to act under him as bailiff of said court. At the time the bond was executed, the jurisdiction of the county court was regulated by statute 9 and 10 Vict. After the execution of the bond, the jurisdiction of that court was extended and increased by several statutes. It was held that these statutes had so materially altered the nature of the office of bailiff that the sureties were no longer liable to indemnify the high bailiff, even though the misconduct of G. was in respect of a matter within the jurisdiction conferred by the statute first named, and as to which the duty of the bailiff was not altered by the later acts.

CAMPBELL, C. J., who delivered one of the opinions in that case, says: "It may be considered settled law, that where there is a bond of suretyship for an officer, and by the act of the parties, or by act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided. * * * The question is whether the nature and functions of the office or employment are changed; for if they are, it is not the same office within the meaning of the bond."

COLERIDGE, J., in the same case, says: "The rights and liabilities of sureties have often been considered in England, and many points are well established. One is, that when the nature of the employment of the principal is so altered by the act either of his employer or of the legislature that the risk of his surety is materially altered, the surety has a right to say, 'I did not bargain for this risk; I am discharged.'"

WIGHTMAN, J., says, in the same case: "It may be taken as a principle of law that a bond by a surety, conditioned for the due performance by his principal of the duties of an office, is rendered null if the office or its duties are so altered as in any degree to increase or vary the risk of the surety, to his possible disadvantage."

Cases to the same effect as those already mentioned might be cited almost without limit. Many additional ones are referred to in the brief of defendants' counsel, and I find nothing to the contrary.

Applying the principles of these authorities to the ascertained facts in the case, I am unable to see how the plaintiff can maintain this action.

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The following propositions, contended for on the part of the defendants, seem to me to be fully sustained: 1. That the defendants are not liable for any want of faithfulness on the part of Dickerson after his second promotion. 2. That when he was promoted to the position of book-keeper, he ceased to be an assistant clerk within the meaning of the bond. 3. That upon a fair construction of the contract, the sureties could not have contemplated a liability after such a promotion. And 4. That the promotion involved a material alteration of the principal's duties, increased the peril of the sureties, and released them from their bond.

It is argued for the plaintiff, "that the change made by the bank in the work done by Dickerson was not material; the risk of the sureties was not increased. It was not a change of duties. He still remained an employee of the bank, and the testimony shows that the cashier or bank officers had the right, and exercised the right, of requiring any clerk in the bank to do the work generally done by some other clerk, even to taking the place of the cashier. The book-keeper and clerks change places and aid each other. While each, acting in his own place, may have duties to perform, each acts, and is expected to act, outside of his own sphere, and to do any work which he may be able to perform, that the interests of the institution require."

The argument, so far as it asserts that the change made by the bank in the work done by Dickerson was not material, and that the risk of the sureties was not thereby increased, is effectually disposed of by referring to the undisputed facts in the case.

The change in the work done was from that pertaining to the lowest office in the bank to the work required in an office two degrees higher, commanding more than double the compensation, different in its character, in the range of its duties, in its opportunities for speculation, and therefore requiring not only a greater capacity, but a firmer integrity. If such a change was not material, it would be difficult, I think, to affirm the materiality of any change whatever.

The fallacy of the argument for the plaintiff lies in the assumption that the defendants bound themselves for the faithful performance by Dickerson of all his duties while in the employ of the bank, without designating any particular office or capacity in which the duties were to be performed. But the defendants' undertaking, instead of being general in its character, was very special and

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limited. Their bond having recited that Dickerson had been appointed an assistant clerk, their undertaking for him was in terms limited to the period during which he should be in the employ of the bank *as such assistant clerk*, and was only for the faithful performance of his duties *as such assistant clerk*.

The office designated was as well known to all the parties to the bond, and was as little liable to be mistaken for another, as that of teller or cashier.

The only legal inference to be drawn from the language of the bond is, that these sureties never intended to bind themselves for the faithful performance by Dickerson of any duties other than those required of him while he held the office of assistant clerk, and performed by him as such assistant clerk. They could not, therefore, be held liable for any want of faithfulness on his part, after his promotion to another office, for the reason that upon such promotion, he ceased to be, within the meaning of the bond, or in any fair sense, in the employ of the bank as an assistant clerk.

Rochester City Bank v. Elwood, 21 N. Y. 88, referred to and much relied on by counsel for the plaintiff, does not appear to me to be in conflict with the views just expressed.

In that case the bond recited that one G. had been appointed assistant book-keeper of the Rochester Bank, and was conditioned that he should "faithfully discharge the trust reposed in him as such assistant book-keeper."

While still holding and exercising the office of assistant book-keeper, he embezzled the funds of the bank, and covered the fraud by false entries in one of the books. This was held to be, as it plainly was, a breach of the surety's undertaking.

There the surety was liable, because the principal had not faithfully discharged the trust reposed in him as assistant book-keeper. Here the sureties are not liable, because their principal did in all things, while in the employ of the bank as assistant clerk, faithfully perform his duties as such assistant clerk.

My conclusion is that under the evidence in this case, Gottlob Seib and John Bea, the sureties on the bond declared on, are released, and the Circuit Court is so advised.

NOTE BY THE REPORTER — *Northwestern Nat. Bank of Minneapolis v. Keen*, Philadelphia Common Pleas, March 13, 1880, 87 Leg. Int. 124, involves the same question and decides it in the same way. There the bond was for the discharge of the duties of book-keeper of the bank, from which position the principal was promoted successively to the positions of teller and assistant cashier. The surety was informed of none of these

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changes. It was held that the surety was not liable for his embezzlement in the last position. The court cite *Müller v. Stewart*, 9 Wheat. 680. They hold that the liability was not extended by the words, "and in every way faithfully and honestly administer his duties while in the employ of the aforesaid bank." They remark: "A person may well be willing to give security that a good accountant will make a good book-keeper, while he would hesitate very long before he would guarantee that a book-keeper could be intrusted to fill a position in which he could embezzle one hundred and twenty-eight thousand dollars before being detected. Human integrity depends very often upon the amount of temptation to which it is to be exposed. And it is as essential to a bondsman to know the stress to which his principal is to be subjected, as it is to a mechanic to know the weight his contrivance is expected to support." Compare *Bull v. Auld*, 87 Penn. St. 419; a. c., 30 Am. Rep. 276.

WILSON v. HERBERT.

(12 Vroom, 454.)

Marriage—liability of married woman for necessities.

Under a statute enabling married women to contract in the same manner as if single, a married woman, living with her husband, can only be made liable for necessities sold to her and on her credit, where she expressly contracts to pay therefor out of her separate estate, or the circumstances show an intention on her part to assume the liability exclusive of the husband.*

ACTION on account. The opinion states the facts. The plaintiff had judgment below.

C. E. Hendrickson, for plaintiff in *certiorari*.

J. H. Gaskill, contra.

DEPUE, J. This action was brought against the plaintiff in *certiorari*, who is a married woman living with her husband. The husband was not joined as a defendant in the suit. The claim of the plaintiff below was upon an open account for goods sold and delivered, commencing May, 1874, and covering a period extending down to July 21st, 1875. Payments had been made on account from time to time, leaving a balance due of \$45.99, for which judgment was rendered, with costs. Of the balance due, the sum of \$6.78 was for goods sold and delivered after January 1st, 1875.

Prior to January 1st, 1875, the liability of a married woman for debts of her own contracting was provided for by the act of March 24th, 1862. Nix. Dig. 543. The common-law disability of a married

*To same effect *Priest v. Cons* (31 Vt. 423), 31 Am. Rep. and note.

woman to enter into contracts enforceable against her by actions at law was not entirely removed by the act of 1862. The common-law disability of coverture was superseded only so far as to enable a married woman to enter into contracts where she was beneficially interested, the consideration moving to her. *Eckert v. Reuter*, 4 Vroom, 266; *Vankirk v. Skillman*, 5 id. 109. The remedy to enforce this statutory liability was by an action against her and her husband, in which the plaintiff was required to aver, in his pleading, the particular facts which, by the statute, removed the disability of the wife to contract, in order to make out a legal cause of action. *Lewis v. Perkins*, 7 Vroom, 133. The plaintiff's action in this case is against the wife alone, and his statement of demand contains only a copy of the account, without any averment of the facts necessary to the liability of the wife under the act of 1862. If the suit had been brought while the act of 1862 was in force, the proceedings would have been radically defective for this reason.

The act of 1862 was repealed by the revision which went into operation on January 1st, 1875. In the revision a different system was adopted. By the fifth section of "An act to amend the laws relating to the property of married women," it was provided that "any married woman shall, after the passing of this act, have a right to bind herself by contract, in the same manner and to the same extent as though she were unmarried, and which contracts shall be legal and obligatory, and may be enforced at law or in equity by or against such married woman, in her own name, apart from her husband; provided that nothing herein shall enable such married woman to become an accommodation indorser, guarantor or surety, nor shall she be liable on any promise to pay the debt, or answer for the default or liability, of any other person." Rev., p. 637. This legislation effected a radical change in the law. It enlarged the powers of married women, and gave a married woman the capacity to enter into any contract which would have been legal if she were unmarried, with the exception of those enumerated in the proviso, and changed entirely the procedure by which such contracts should be enforced by action, viz., by a suit against her in her own name, in which the common forms of pleading would be sufficient.

[Omitting a technical point.]

The other question discussed on the argument touches the merits of the case, and applies as well to the items of the account prior

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to January 1st, 1875, as to the single item after that date. The court below, contrary to repeated decisions of this court, instead of returning with this writ its findings on matters of fact, has returned the evidence, and we are left to grope through the testimony to find the legal principles on which the judgment was founded.

The plaintiffs were engaged in the business of butchers, at Mount Holly. The defendant was the wife of one Jacob M. Wilson. The husband and wife lived together on a farm near Mount Holly, which the husband had rented in his own name. It was in evidence that the husband did all the business connected with the farm; kept boarders, and contracted with them and collected the money due for board. The wife lived with her husband, managing the domestic affairs of the family, and had no separate estate or business of her own.

The account sued on was for meat delivered at the husband's residence, and used for domestic purposes. It was selected and ordered by the wife, and was charged to her in the plaintiffs' books.

The statutes which have endowed married women with the power to have separate property, and to hold it as if they were unmarried, have not dissolved the marriage, or abolished the peculiar incidents of the marital relation. The duty of providing maintenance and support for the family still devolves on the husband, and the wife may discharge her duties in the management of his domestic affairs without incurring personal responsibility. The purpose and comfort of married life would be defeated if the wife had not authority to hire servants and purchase articles necessary for domestic use, and for this purpose the law regards her as the agent of the husband. 1 Pars. on Cont. 347. And it is of the greatest importance to society that the wife should be allowed to perform her duties in the management of the husband's domestic affairs as his agent, without liability on her part, on contracts made by her in the line of her duties, unless she voluntarily assumes a personal responsibility.

In New York, under a statute which provided that the separate property of a married woman should not be subject to the interference or control of her husband, or liable for his debts, except such debts as were contracted for the support of herself or her children, by her *as his agent*, it was held, upon reasoning founded on considerations of public policy and the general intent expressed in other

acts of the legislature on the same subject, that the legislature could not have intended by that statute to make the separate estate of the wife liable for a debt contracted by the husband through her agency, and that necessaries purchased by a married woman were not chargeable on her separate estate, unless, perhaps, purchased expressly on the credit of it, and charged upon it by some affirmative act on her part. *De Mott v. McMullen*, 8 Abb. Pr. (N. S.) 335. In another case it was decided that a promissory note subsequently given by a married woman for goods which were purchased by her upon credit, for family use, while her husband was residing and cohabiting with her and supporting his family, was absolutely void, and had no foundation either in law, equity, conscience or good morals, unless there was some special agreement by which the goods were sold to the wife for her exclusive use, upon the credit of her separate property, and not upon the credit of her husband. *Smith v. Allen*, 1 Lans. 101.

The principle which should govern in controversies of this kind, under the legislation of this State on this subject, is quite apparent. The statute allows a married woman to contract as a *feme sole*, except that she cannot become surety or make any valid promise to pay the debt, or answer for the default or liability of any other person. When husband and wife are living together, and the wife purchases articles for domestic use, the law imputes to her the character of an agent for her husband, and regards him as the principal debtor. She may contract for such articles as principal, and assume the responsibility of a principal debtor. But to fix upon her such a liability it must affirmatively appear that she made the purchase on her individual credit. There must be either an express contract on her part to pay out of her separate estate, or the circumstances must be such as to show clearly that she assumed individual responsibility for payment, exclusive of the liability of the husband. For if the purchase be made under such circumstances as that an action could be maintained against the husband for the contract price, the debt so contracted becomes his debt, and the statute invalidates the contract of the wife for its payment.

In the present case, the proof was that the husband supported his family. The wife testifies that she purchased as the agent of the husband, and by his authority; that the payments on account were made with money furnished by the husband; that the port credited on the account belonged to the husband; that the hus-

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band directed the plaintiffs to come to the house with the wagon. These facts were undisputed.

On the part of the plaintiffs, it appeared in evidence that the goods were charged to the wife on their books, but it did not appear that the wife directed them to be so charged, or knew that the account had been kept in that manner. The plaintiff's reason for making the charge to the wife arose from his custom of charging meat to the one who got it, whether man or woman; that he charged it to Mrs. Wilson because she got the meat of him.

The only special circumstance adduced to show that the debt was the debt of the wife was a pass-book which was in the defendant's custody, and which contained entries of the items of the account. The items were not preceded by any heading, but on the front cover of the book was written, "Mr. Jacob Wilson, in account with Frank O. Herbert." There was evidence that "Mr." was originally written "Mrs." Assuming that to be so, such an indorsement is ambiguous. It may show merely the state of the account which the wife was running up in making purchases for family use, and when taken in connection with the other evidence, does not afford proof of an individual liability on the part of the wife of such clearness and distinctness as to supply the proof necessary to fix an individual liability on the wife.

The judgment should be reversed, with costs.

Judgment reversed.

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(12 Vroom, 510.)

Criminal law — intent — when criminal intent not necessary.

Where a statute in general terms makes an act indictable, a criminal intent need not be shown in one indicted under it, unless the purpose to require it can be discovered in the language employed.*

ON error to the Supreme Court. The defendant was convicted under an act as follows:

"1. BE IT ENACTED by the Senate and General Assembly of the State of New Jersey, That if any board of chosen freeholders, or

*See *State v. Fitzgerald* (40 Iowa, 280), 31 Am. Rep. 143.

any township committee, or any board of aldermen or common councilmen, or any board of education, or any board of commissioners of any county, township, city, town or borough in this State, or any committee or member of any such board or commission, shall disburse, order, or vote for the disbursement of public moneys, in excess of the appropriation respectively to any such board or committee, or shall incur obligations in excess of the appropriation and limit of expenditure provided by law for the purposes respectively of any such board or committee, the members thereof, and each member thereof, thus disbursing, ordering or voting for the disbursement and expenditure of public moneys, or thus incurring obligations in excess of the amount appropriated and limit of expenditure as now or hereafter appropriated and limited by law, shall be severally deemed guilty of malfeasance in office, and on being thereof convicted shall be punished by fine not exceeding one thousand dollars or imprisonment at hard labor for any term not exceeding three years, or both, at the discretion of the court."

The indictment charged that at a meeting of the board of freeholders, December 14th, 1876, a resolution was adopted for purchasing land for a court-house site for \$225,720, to be paid for in bonds of the county, "payable out of the amount appropriated and limited for the next fiscal year,"—"said bonds to run one year from date," etc.; that the defendant presided at this meeting and subsequently approved the resolution, and together with the county collector, signed the bonds in accordance with the resolution; that the next fiscal year after December 14th, 1876, would commence December 1st, 1877, and that no appropriation or limit of expenditure had been fixed for this latter year. It also appeared that for the fiscal year commencing on December 1st, 1876, the tax fixed by resolution was the sum of \$600,000.

H. C. Pitney (with whom was *J. D. Bedle*), for plaintiff in error.

John P. Stockton, attorney-general for the State.

BEASLEY, C. J. It appears by the record in this case that at a meeting of the board of freeholders of the county of Hudson, on the 27th of June, 1876, a resolution was adopted fixing the tax to be raised for county purposes for the fiscal year commencing on the 1st of December, 1876, at \$600,000; and that afterward, at a meeting on the 14th of December, 1876, a resolution was passed,

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directing the purchase of a certain site for a court-house, at a price amounting in the aggregate to \$225,000 : and that in payment of said lands, a bond or bonds of the county of Hudson should be issued, payable out of the amount to be appropriated and limited for the expense of the next fiscal year, being the fiscal year commencing on the 1st day of December, 1877, such bonds to run one year and to bear interest at the rate of seven per cent per annum. The indictment further shows that a conveyance for the land above mentioned was duly made, and the bonds of the county conformably issued in payment therefor.

It is insisted by the counsel of the defendant, that admitting that such defendant was a member of the board of freeholders, it does not appear from these facts that he committed an indictable offense. This contention puts in question the meaning of the supplement to the Crimes Act, approved February 7, 1876.

I have found it somewhat difficult to realize that any disinterested person, upon a careful reading of that statute, can have any doubt with respect to the legislative purpose as expressed in its language. By the general law the board of freeholders ascertain, before a certain date, the amount of tax necessary for county purposes for such year, and the manifest purpose of this supplement was to require the freeholders to make all payments during the year out of that fund, or out of moneys in hand, and to contract no obligations that were not to be so paid. Unless the act means this it has no sensible meaning. The provision, as a practical refutation, becomes absurd, if we give to it a signification that will support this defense, because although it is intended as a circumscription of official authority, it has no force whatever in that direction, for these boards, upon such a theory, can contract what debts they please, provided they make such debts payable out of a future assessment. No uncertainty in this respect has been perceived by me. The offense is committed whenever one of these boards, or any member of any one of them, "shall disburse, order, or vote for the disbursement of public moneys in excess of the appropriation respectively, to any such board or committee, or shall incur obligations in excess of the appropriation and limit of expenditure provided by law for the purposes respectively of any such board or committee," etc. Here, then, is a clear prohibition against incurring any obligations in excess of "the appropriation and limit of expenditure." In this case the board's appropriation was \$600,000, and the freeholders in-

curred this debt of \$225,000 in addition to such appropriation, because they provided, in express terms, that it should not come out of such fund. By the terms of the bonds issued by the board this additional sum was not to fall due during the current fiscal year; and by the express terms of the resolution the debt so evidenced was to be paid, not out of the \$600,000 in their hands, but out of the levy of taxes to be made the next fiscal year. By such an arrangement the whole \$600,000 were left in their hands, untouched and unaffected by this obligation; and such fund, if left unused by them, and although it should have been passed by them to their successors in office, was not to be devoted to the payment of the debt in question. This regulation is so plain that it is difficult to comprehend how any person, not under a misleading bias, can fail to understand that all attempts, no matter by what device, to carry over by a new engagement debts falling due in the current year, or debts created during such year, to a subsequent year for payment, is in direct conflict both with its terms and spirit. The system clearly defined here is, that a certain fund is provided for all the expenses and disbursements and obligations to be incurred during the current year, and that every obligation or debt incurred during such year is to be paid out of the fund so provided, and that all debts incurred which are to be paid out of a fund to be raised in the future is in excess, or what is the same thing, is in transgression of the limit of expenditure established by law. I entirely concur in the view taken on this subject in the Supreme Court, and am of opinion that this assignment of errors cannot avail the defendant.

[Omitting a minor point.]

The next objection relates to the overruling at the trial of certain exculpatory facts.

When the State had closed, the defense offered to show that the defendant, in aiding in the passage and effectuation of the resolution which I have pronounced to be illegal, did so under the advice of counsel, and in good faith, and from pure and honest motives, and that he therein exercised due care and caution. The arguments upon this interesting topic, contained in the briefs of the respective counsel, marked, as such briefs are, by acute reasoning and copious learning, have been of much assistance in the examination of the subject.

On the part of the defense, it is strongly urged that the defend-

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ant was not a volunteer in this affair; that he was bound, under the obligations of public duty, to decide and act in the premises, and that if he acted with an honest purpose, and with due circumspection, to hold him guilty under this law would be contrary to those essential principles of justice and public policy on which all law is founded. To enforce this view, we are referred to those general maxims of criminal law which have been so often repeated by judges, and which are so well summarized by Mr. Bishop in the first volume of his work on Criminal Law, section 203, to the effect, "that in no one thing does criminal jurisprudence differ more from the civil than in the rule as to intent. Crime proceeds only from a criminal mind." Looked at in this light, and in this general aspect, the position of the defence is well calculated to strike the mind with great force, for we have there as the elements of the juncture that the defendant was honest, that he acted with caution, and that he was compelled to act, so that his violation of law was an unavoidable resultant from a discharge of duty, in its best form. It is therefore urged, that the result is that the rule of law that will convert the defendant into a criminal is a rule that must inevitably, on many occasions, lead to the inculcation, by force of the criminal law, of this class of officials if they discharge their duty faithfully.

But it will be observed that the principle that infuses life into this line of argument is too broad to be assented to in its full extent. Nothing in law is more incontestable than that with respect to statutory offenses, the maxim that crime proceeds only from a criminal mind does not universally apply. The cases are almost without number that vouch for this. The defendant in this case pleads that he was ignorant of the law as applied to the facts involved in his conduct. But it has been many times decided, and indeed is the admitted general rule, that ignorance of the law is no defense against a criminal charge. Mr. Wharton, in an article published in the *Albany Law Journal* on February 5th, 1879, page 34, says "that ignorance of law is no defense is generally admitted."

Mr. Broom, in his *Legal Maxims*, thus clearly delineates the legal doctrine: "It is," says Lord KENYON, "a principle of natural justice, and of our law, that the intent and the act must both concur to constitute the crime." "A man," as remarked by EARLE, C. J., "cannot be said to be guilty of a *delicti*, unless, to some ex-

tent, his mind goes with the act. And the first observation which suggests itself in limitation of the principle thus enunciated, is that whenever the law positively forbids a thing to be done, it becomes thereupon *ipso facto* illegal to do it willfully, or in some cases, even ignorantly, or maybe, to effect an ulterior laudable object, and consequently the doing of it may form the subject-matter of an indictment, or other legal proceedings *simpliciter*, and without the addition of any corrupt motive."

In the case of *State v. Goodenow*, 65 Me. 30, it was decided, on an indictment for adultery, that the defendant could not defend on the plea that she believed that she had been legally divorced. And in like manner, it is easy to cite cases establishing the doctrine beyond dispute or cavil, that in many cases an honest mistake in regard to a state of facts will not exculpate when the prohibition of a statute has been violated. As an illustration, I will refer to *Reg. v. Woodrow*, 15 M. & W. 404, which was an information against a retailer of tobacco, for having in his possession adulterated tobacco; and it was held that he was punishable, although it was shown that he had purchased it as genuine, and had no knowledge or cause to suspect that it was not so. Another example is presented in *Commonwealth v. Mash*, 7 Metc. 472, which was the case of a woman marrying after her husband had been absent for several years, in the honest belief that he was dead; such defence being disallowed. But on this head it is not necessary to multiply authorities. A crowd of them are collected in the brief of the attorney-general, and in fact it is admitted by the counsel of the defense that in a large number of instances of statutory offenses, the crime may be committed in the absence of any wrongful intent. Nor even with respect to the common law is it true that a guilty purpose, or the possession of the knowledge requisite to make the mind guilty with respect to a particular act, is an essential part of criminality. It is settled in that system by indubitable authority, that a statute may be violated by a person so soon after its passage that the fact of its enactment could not by possibility have come to his knowledge. Judge STORY, in one of his decisions, recognizes this as an established principle of the common law, and applies it to the issue before him.

But on the other hand, it is equally undeniable that in some cases, when the prohibition in a statute against doing a certain act, or series of acts, is couched in general terms, courts have, to use

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the language of Lord COCKBURN, imported into the statute a proviso that the denoted act shall be done from a guilty mind. Such was the case of *Rider v. Wood*, 2 E. & E. 338, which was an information against the defendant for unlawfully absenting himself from the service of his employer during the term of his contract of service, contrary to statute, the proceeding being founded on a law which enacted that if any servant, etc., "shall contract with any person or persons to serve him, etc., for any time or times whatsoever, and having entered into such service, shall absent himself or herself from his or her service before the term of his or her contract shall be completed, the person so offending may be committed," etc. The defendant having absented himself from the service contracted for by him, under the honest belief that a notice that he had served had legally dissolved the contract, the court held that he could not be convicted if he had given the notice in good faith, and believed in its legal efficacy, although in point of law such notice was a nullity. This is manifestly a clear case in which the court held that the culprit must have had a guilty mind, although such ruling had the effect of qualifying the general statutory language. There are other cases in the same line cited in the briefs.

Now these two classes of cases, diverging as they do, and seemingly standing apart from each other, may at first view appear to be irreconcilable in point of principle; but nevertheless, such is not the case. They all rest upon one common ground, and that ground is the legal rules of statutory construction. None of them can legitimately have any other basis. They are not the products of any of the general maxims of civil or natural law. On the contrary, each of this set of cases is, or should have been, the result of the judicial ascertainment of the mind of the legislature in the given instance. In such investigations the dictates of natural justice, such as that a guilty mind is an essential element of crime, cannot be the ground of decision, but are merely circumstances of weight, to have their effect in the effort to discover the legislative purpose. As there is an undoubted competency in the law maker to declare an act criminal, irrespective of the knowledge or motive of the doer of such act, there can be, of necessity, no judicial authority having the power to require, in the enforcement of the law, such knowledge or motive to be shown. In such instances the entire function of the court is to find out the intention of the leg-

islature, and to enforce the law in absolute conformity to such intention. And in looking over the decided cases on the subject it will be found, that in the considered adjudications, this inquiry has been the judicial guide. And naturally, in such an inquiry, the decisions have fallen into two classes, because there have been two cardinal considerations of directly opposite tendency, influencing the minds of judges; the one being the injustice of punishing unconscious violations of law, and the other the necessity, in view of public utility, of punishing, at times, some of that very class of offenses. All the cases that are pertinent that are relied upon by the counsel of the defendant in this case are decisions that have been produced mainly under the influence of the former of these two classes of considerations, but they are all, nevertheless, mere constructions of the respective statutory enactments. These citations are made with a view to show that as a general rule the courts will require a corrupt motive to be shown when the statutory denunciation against doing an act contains no such requisition. But the authorities vouched do not sustain that large proposition; they simply evince that in those special instances in construing the respective enactments, a legislative purpose was perceived of requiring, to constitute the offense, a mind conscious at the time of wrong doing. The decisions thus adduced are not many; some of them are not apposite to the question; and none of them can be said to sustain the proposition that in cases where a statute in general terms prohibits the doing of a particular act, the court will interpolate into such statute the requirement of a corrupt motive as an ingredient of the offense, on the sole ground that otherwise it would be opposed to natural justice. For a moment I will turn my attention to these cases, to see how far they sustain the proposition above stated, or the kindred proposition that a misapprehension as to the legal application of a statutory prohibition will excuse its infringement. The two cases of *Rex v. Jackson*, 1 T. R. 653, and *Rex v. Barrat*, Doug. 449, have no relevancy, as they were motions for informations, and were therefore applications addressed to the discretion of the court. The next case is that of *Commonwealth v. Bradford*, 9 Metc. 268, in which the indictment was for illegal voting, but it can have no appreciable bearing upon the present inquiry, for although it was indeed held that a mistake with reference to the law might be proved, it appeared that the statute alleged to have been violated, made a knowledge of the law a component part

of the offense. The act imposed a penalty on a person who should vote "knowing himself not to be a qualified voter;" and the court sanctioned the admission of evidence tending to show an honest error as to the law. I do not think that it is to be questioned that where a corrupt purpose or guilty knowledge is a part of the crime, ignorance of the law may be shown. The recent case of *State v. Noyes* was affected by such a circumstance, and the defendant was permitted to show, in repulsion of the charge of fraud, that he was honestly mistaken as to the law and that he acted under the advice of counsel. In the present case, if this act of 1876 had declared that if any member of the board of freholders should corruptly contract a debt in excess of the prescribed limit, there would not upon this point have been any question worthy of a moment's discussion. The next case, which is that of *Commonwealth v. Shed*, 1 Mass. 223, is subject to this same criticism.

The next case is the anonymous one taken from 2 East's P. C. 765, and it, with respect to its enactment, was this: A statute made it an indictable offense for any person to have in his possession any canvas stamped with the king's mark, unless such person had a certificate of an officer of the crown showing how such article came into his possession. The defendant, who was a woman, was found with such a piece of canvas in her possession, and had no certificate showing how it came to her. On the trial it appeared that the defendant's husband had purchased it in his life-time at a public sale by the officers of the navy, and had used it in the family, and that it had been left in the house at his death, and that no certificate appeared to have been taken at the sale. It was obvious that the defendant was morally not guilty and the court pronounced her legally not guilty. As far as appears there was no attempt to put any construction on the statute, derived from its language or the object at which it aimed, but the case as reported was disposed of by the remark made apparently to the jury, that "if the defendant's husband really bought the linen at public sale, but neglected to take a certificate, or did not preserve it, it would be contrary to natural justice, after such a length of time, to punish her for his neglect." This as an observation to the jury would not be out of the way, but as lapse of time could have nothing to do with the matter in its legal aspect, it would be an improbable conclusion to infer that the judge in these expressions was assigning his grounds for holding this law inapplicable if the defendant's

possession of this article was unconsciously wrongful. But I do not think this case, from extrinsic considerations, of much force as a precedent. It is true that the judgment is said to have been rendered, under the circumstances stated, by FOSTER, J., who in his day was eminent for his learning, especially in the field of criminal law, but the case is not taken from the well-known volume entitled "Foster's Reports," and which was prepared and published by the judge himself, but from the appendix added by another hand to the third edition, and which appendix is of no authenticity, for we are informed by Mr. Dodson, in his life of Judge FOSTER, that this appendix contains matters which the judge, by the advice of Lord MANSFIELD and Lord HARDWICKE, had himself suppressed. I also observe that in the preface to his own edition this venerable magistrate says that he is about to submit a few crown cases in which he had taken a share, and that his other notes "are too crude and imperfect to admit of publication," and yet it is from these notes that the appendix in question has been composed. It seems to me this case is of little account. Moreover, it is highly probable that it was, in point of fact, put on the same ground with *Reg. v. Sloop*, 8 Cox's C. C. 472, which is another authority cited for the defense, and which was the case of a person indicted under the same statutory provision for having in his possession certain copper marked with an arrow, denoting that it had formerly belonged to the government. The jury having found that the evidence was insufficient to show that the copper was thus marked, COCKBURN, C. J., and his associates adjudged that there could be no conviction, the chief justice saying that "the ordinary principle that there must be a guilty mind to constitute a guilty act applies to this case, and must be imported into this statute, as was held in *Reg. v. Cohen*, 8 Cox's C. C. 41, where this conclusion of law was stated by HILL, J., with his usual clearness and power." It will be perceived that the chief justice does not attempt to justify the implication made by him, except by the reference to the judgment of HILL, J., in the case named, so that we are constrained to refer to that decision for explanation, and by doing so, we find the enactment in question is expounded in the usual way by a reference to its context and its effects, and the conclusion arrived at that unless the adjudged interpretation should be adopted the act would be run into absurdity. No one can doubt that granting these judicial premises, the conclusion was in harmony with ordinary rules.

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The remaining cases cited, *Reg. v. Tinkler*, 1 Fos. & F. 513 ; *Hearne v. Garton*, 2 E. & E. 66 ; *Rider v. Wood*, id. 338 ; *Taylor v. Newman*, 4 B. & S. 89 ; *Buckmaster v. Reynolds*, 13 C. B. (N. S.) 62, and *United States v. Connor*, 3 McLean, 573, are all decided on the same principle that was applied in the last case just specially noticed. It is in this class of decisions that the case of *Cutter v. State*, 7 Vroom, 125, is to be included.

These cases have been specially referred to by me, with the purpose of illustrating by examples the conclusion already expressed, that the subject under consideration is completely embraced in the legal department of statutory construction, and that each decided case rests on its own facts and particularities, and that the maxim, "*actus non facit reum nisi mens sit rea*," has no controlling effect. That this maxim has, and should have, in every doubtful case a decided influence, is not denied ; but it is intended to be affirmed that when an act is prohibited in express terms by a statute, such prohibition cannot be contracted so as to embrace only such persons as guiltily do such act, by the unassisted force of such maxim.

The course of the inquiry, therefore, has led to this point ; is there any thing in the language of the statute now to be construed, or in the legislative design displayed in it, or in the consequences, if its terms are construed strictly, by force of which this court can limit its operation to those only who act with consciousness of violating the law?

Now it is incontestable, that in view of the interpretation above put upon this provision of the statute, the duty thereby required of this defendant was of the simplest possible character. According to that interpretation the legislature, in effect, said to these freeholders, "yourselves fix the sum requisite for your expenditure during the year, but you are interdicted from making any payment or contracting any debt beyond such limit." I find it impossible to regard such a prohibition as involving any idea of complexity, or difficulty in its execution. To obey such an injunction seems, to my mind, a very intelligible matter indeed ; certainly a duty much easier of performance than that of the retailer of tobacco, mentioned in the case already cited from Meeson & Welsby, who was enjoined, under a penalty, not to have in his possession any adulterated tobacco, and which duty, his counsel contended, could only be perfectly and certainly performed by having a chemical analysis made of each sample that he purchased. If the duty, then, be a simple one, and not one which is subject to very great difficulties

in its performance, there is nothing in the nature of the act prohibited from which the court can say, in the face of the legislative language, that it was not the intention to make it applicable to every one who should violate its letter. Counsel indeed pressed upon the court the consideration that this statute, from the infelicity of its phraseology, was, with respect to its purpose or application, open to much question, and that in point of fact professional gentlemen had expressed variant opinions with regard to it. This may be so, but when the question is as to the intention of the legislature, this argument is out of place. It would be preposterous for this court to hold that the legislature, in this act, has intended to punish the person who infringes the letter of this law, without regard to the question of his moral delinquency, and at the same time to say that such effect shall not be given to the statute, because of the lame way in which it has been penned. This would be to put the case upon the rejected ground of the hardship arising from applying the law to a person whose mind was not guilty, instead of abiding by the adopted doctrine of ascertaining the intention of the law maker. The sole business of the court is to find the meaning of this law, and then to give it effect in that sense. It will also be observed that the result to which I have come, that this duty imposed on the freeholders is a plain one and one not difficult of performance, dissipates all idea that the court can, by construction, control the generality of its terms, on the ground that read in its rigor, it bears so hardly on this class of officers as to raise a presumption against such an interpretation. If there has been any hardship, it has arisen from the verbal obscurity of the statute, and such a consideration, it has been just remarked, ought not to affect the mind of the court. Nor is it the province of the court to say whether this law is too rigorous or not; that is the part of the legislature; but it certainly is not clear that such a regulation may not be subservient to a wise public policy. Entertaining the view that the act which this defendant was ordered to abstain from doing was neither difficult to comprehend or to perform, I find myself unable to yield to the notion that the language of the provision in question can be curtailed by construction.

The judgment should be affirmed.

For affirmance — The CHANCELLOR, CHIEF JUSTICE, DEPECK, REED, SCUDDER, VAN SYCKEL, WOODHULL, CLEMENT, DODD, GREEN, LILLY, JJ. — 11.

For reversal — None.

Judgment affirmed.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

GLOBE MARBLE MILLS COMPANY V. QUINN.

(76 N. Y. 23.)

Fixtures — title to, as between lessee and mortgagee.

A lessee, under a provision in the lease allowing him so to do, purchased the premises from his lessor. The premises were sold subject to a mortgage by the lessor. The lessee before the deed to him had placed machinery on the premises. *Held*, that such machinery did not, by operation of law, become part of the realty, as between the lessee and the mortgagee, although so affixed as to be realty as between vendor and vendee.*

ACTION for damages for the conversion of machinery and fixtures, tools, etc. Doherty, owner in fee of the premises, consisting of vacant lots in Brooklyn, on the 1st of October, 1868, leased the same to McDonald for ten years, with a covenant of sale to the lessee or his assigns. McDonald assigned the lease to the plaintiff, which erected a mill thereon, and put in machinery while it held the premises under the lease. On the 1st of November, 1870, Doherty conveyed to O'Brien the fee of the premises, subject to the lease, and also subject to a mortgage made by him. On the 18th of March, 1871, O'Brien conveyed the premises to the plaintiff, subject to all incumbrances. The mortgage was foreclosed and the premises were sold to McDonald. On the sale, notice was given that the

*See *contra*, *Jones v. Detroit Chair Co.* (38 Mich. 92), 31 Am. Rep.

machinery was claimed by plaintiff as personal property, and did not go with the sale of the real estate. Defendant claimed title under the purchaser at the sale. The plaintiff had judgment below.

D. P. Barnard, for appellant. When plaintiff became owner of the fee its rights as tenant were merged in the fee and the mill and machinery thereby became real property. *Müller v. Plumb*, 6 Cow. 665; *Walker v. Sherman*, 20 Wend. 636; *Snedeker v. Warring*, 12 N. Y. 170; *Tift v. Horton*, 53 id. 377, 380. When plaintiff became owner of the premises its estate as tenant terminated by merger and its term was gone. 4 Kent's Com. 99; Bingham on Real Estate, 267; *Nellis v. Lathrop*, 22 Wend. 121, 123. As soon as plaintiff became owner of the fee all such fixtures as would pass with the estate as between vendor and vendee, and mortgagor and mortgagee, became a part of the real estate. *Elves v. Man*, 1 Smith's Lead. Cas.; *Loughran v. Ross*, 45 N. Y. 792; *Brooks v. Galster*, 51 Barb. 196.

Richard O'Gorman, for respondent.

ANDREWS, J. Assuming that there was such an annexation of the machinery placed by the plaintiff in the mill, on the premises now owned by the defendant, as would, within the general rule of law, and as between vendor and vendee, make it a part of the realty, the fact that the plaintiff was lessee at the time the annexation was made, preserved its character as personal property, and the lessee could have removed it at any time during the existence of the tenancy.

The defendant, who has derived title to the real estate under a mortgage executed by the lessor, subsequent to the lease, and while the tenancy was subsisting, occupies the position of the lessor; and unless the plaintiff, by some act or omission after the mortgage was executed, has lost the right to treat the machinery as personal property, so that it passed to the purchaser, on the foreclosure, as a part of the realty, the right of action is maintained. *Mott v. Palmer*, 1 N. Y. 564; *Ford v. Cobb*, 20 id. 344; *Tift v. Horton*, 53 id. 377. The conversion of the machinery from personal to real property is claimed to have resulted from the purchase by and the conveyance to the plaintiff of the fee of the land, under the provisions of the lease, after the execution of the mortgage and prior

to the foreclosure. The estate for years merged in the fee. As a consequence of the union of the two estates in the same person, the lesser estate was, by the technical but well-settled rule of the common law, extinguished. But the consequence claimed, that the machinery became *eo instanti* by operation of law, a part of the realty, upon the acquisition by the plaintiff of the fee of the land to which the machinery was attached, does not, we think, follow.

The estate which the plaintiff had as lessee merged in the estate in fee. But the ownership of the chattels, which was vested in the plaintiff before the conveyance of the land, was separate from and independent of its interest under the lease, and was not derived from the lessor. The chattels were not a part of the inheritance. This ownership was not merged, because it was not an interest carved out of the fee; and the doctrine of merger does not apply. If the plaintiff, after it acquired the fee, had mortgaged or conveyed the land, all that was comprehended within the designation of land would pass, and quite a different question would be presented. In this case, the express and presumed intention of the plaintiff, when the machinery was put into the mill, was that it should remain personal property. There is nothing to indicate a change of intention afterward. The plaintiff executed a chattel mortgage upon it, and at the sale under the foreclosure gave notice that it claimed it as personal property. We think it was not incorporated into and did not become a part of the realty, as a legal consequence of the acquisition of the fee, in the absence of any evidence of intention on the part of the plaintiff that the character of the property should be changed. The fact that the property, when conveyed to the plaintiff, was subject to a mortgage may have constituted a reason why the plaintiff should desire to preserve its original character; but without this, the mere absence of motive to keep it separate from the realty does not, we think, warrant the conclusion that it became, as between these parties, part of the land.

The plaintiff was not in default for not removing the machinery. The tenancy had expired before the sale under the mortgage, but the plaintiff had become the owner of the land; and, by the stipulation made with the original purchaser on the mortgage sale, the plaintiff had the right to remove any personal property on the premises, within thirty days thereafter. This time had not expired when the conversion in question took place.

The judgment should be affirmed.

All concur.

Judgment affirmed.

STRYKER V. CASSIDY.

(76 N. Y. 50.)

Mechanics' lien — "labor" — supervising architect.

Under a mechanics' lien act, giving a lien to any person who shall perform labor, etc., a supervising architect may enforce a lien. (*See note, p. 264.*)

ACTION to enforce a mechanics' lien. The opinion states the case. The plaintiff had judgment, which was reversed at General Term.

N. C. Moak, for appellant.

H. C. Place, for respondent. Plaintiff is not protected by the lien law of 1862 (chap. 478), that act being intended for the protection of laborers and material men. *Aikin v. Wasson*, 24 N. Y. 482; *Coffin v. Reynolds*, 37 id. 640; *Balch v. N. Y. and Os. M. R. Co.*, 46 id. 521.

ANDREWS, J. This case presents the question whether an architect employed by the owner, to superintend the erection or alteration of a house or other building, is entitled under the act (chap. 478 of the Laws of 1862) to a lien upon the premises for the value of his services, on filing the notice provided in the act. The act authorizes a lien to be created in favor of "any person who shall perform any labor, or furnish any materials, in building, altering, or repairing any house, etc., by virtue of any contract with the owner," etc. This language is general and comprehensive, and its natural and plain import includes all persons, who perform labor, in the construction or reparation of a building, irrespective of the grade of their employment, or the particular kind of service. The architect who superintends the construction of a building performs labor as truly as the carpenter who frames it, or the mason who lays the walls, and labor of a most important character. It is not any the less labor within the general meaning of the word, that it is done by a person who is fitted by special training and skill for its performance. The language quoted makes no distinction between skilled and unskilled labor, or between mere manual labor and the labor of one who supervises, directs, and applies the labor

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of others. The plaintiff is within the language of the first section, and his right to a lien must be conceded, unless it appears from other parts of the act, that it was not the intention of the legislature to give a lien for the kind of labor performed by him. Looking at the whole act it is plain that it was not passed simply for the protection of laborers, using that word in a restricted sense as designating those who work with their hands, and are dependent upon their daily toil for their subsistence. Mechanics' lien acts were originally enacted for the especial protection of this class of persons, but their scope has been greatly extended. Under the act in question a lien may be created not only in favor of workmen employed by a contractor, but in favor of the contractor also. The lumber dealer, the hardware merchant, in short any person who supplies materials for the use of the building, may acquire a lien thereon for their value. The right to acquire a lien is not confined to persons who may be supposed to need the especial protection of the State.

The general principle upon which the lien laws proceed is that any person who has contributed by his labor, or by furnishing materials to a structure erected by an owner upon his premises, shall have a claim upon the property for his compensation. The dealer who furnishes the paints and oils, the ordinary workman who applies them, or the artist who uses his skill and taste in executing a mural painting, are alike protected by the act. And an architect who makes the plans and supervises the erection of a building is within the words and reason of the law.

The cases of *Aikin v. Wasson*, 24 N. Y. 482, and *Coffin v. Reynolds*, 37 id. 640, arose under statutes, making stockholders of corporations liable for debts owing by the corporation to "laborers or servants," and the court, proceeding upon the ground that the statutes then under consideration were intended for the protection of persons belonging to the class commonly known as laborers or servants, and performing manual labor merely, held in the one case that a contractor for building a portion of a railway, and in the other that a secretary of a corporation to whom the corporation was indebted for services in that capacity were not laborers or servants within the acts in question.

The lien law in question here does not indicate an intention to restrict the benefits of the lien to laborers or servants in the sense in which those words were used in the statutes under consideration

in the case cited. Contractors are clearly within it, as its provisions show, and there seems to be no ground for refusing a lien to an architect, and allowing it in favor of contractors, or dealers who furnish materials to be used in the erection. The lien is given to all persons performing labor and not to a particular class of laborers, as in the other statutes referred to. We are therefore of opinion that upon the facts in the case, the plaintiff was entitled to a lien, and that the conclusion of the General Term upon this point was erroneous.

The point is taken that it did not appear that a copy of the notice of lien had been served on the owner. Without determining whether the service of such notice was essential to the creation of a lien, it is sufficient to say that this point was not suggested on the trial, and as the objection if taken at that time might for all that appears have been obviated, it cannot now be considered.

The plaintiff was not precluded, by the account rendered, from claiming a larger sum in the action subsequently brought, or from recovering a larger sum if the proof justified it. The defendant did not assent to the account as rendered, and it was for the referee to determine the weight to be given to the account rendered as an admission of the extent of the plaintiff's claim. *Williams v. Glenney*, 16 N. Y. 389.

The order of the General Term should be reversed, and judgment on the report of the referee affirmed, with costs.

All concur, except MILLER, J., not voting.

Judgment reversed.

NOTE BY THE REPORTER. — There has been considerable discussion as to who is a "laborer," "workman," or "servant," within the meaning of various statutes. Under the New Jersey mechanics' lien law, the language of which is like the New York, it was held, without discussion, in *Mutual Benefit Life Ins. Co. v. Rowand*, 26 N. J. Eq. 368, that "the man who draws the plans and superintends and directs the construction, is clearly within the provisions."

Under the Pennsylvania statute, which is like the New York statute, except in the use of "work" instead of "labor," the like decision was made in *Bk. of Pennsylvania v. Gria*, 36 Penn. St. 423. The court said: "The contract in this case denominates the plaintiff an architect. That he was at the same time a mechanic is evident from the requirement not only to draw the plans of the work to be done, but the duty of explaining and directing its proper execution. This is work often done by the master-mechanic, and is as essential to the due construction of a building as is the purely mechanical part; for without it, shape, symmetry, and proportion would be wanting; elements, not of beauty alone, but of strength and convenience, in every superstructure. To preserve these elements some architectural skill is required, but is generally exercised, in ordinary buildings, by a mere mechanic by occupation. This would certainly not impair his right to a lien as such mechanic. A mere naked architect, who may be such without being an operative mechanic, who draws plans in anticipation of buildings usually, to enable the builder to determine what kind he will erect, could hardly be supposed to be within the act which provides a

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lien for work 'done for or about the erection or construction of the building.' But very distinguishable from this is the case of a party employed to devote his entire time to a building, and who draws the plans for every part of the work, and directs its execution according to such plans and specifications. This is labor—mechanical labor of a high order—contributing its proportionate value to the beauty, strength, and convenience of the edifice. Why is not this to be considered as meritorious as mere manual labor with the tools of a trade? Both are necessary to the accomplishment of the end and view, and both were necessary, or were deemed so to be in this case, to the progress of the building, and in and about its construction."

The Canadian case of *Arnoldi v. Goutin*, 22 Grant's Ch. 314, was one of a designing and supervising architect. The statute enacts that every mechanic, machinist, builder, miner, laborer, or other person doing work upon or furnishing materials to be used in the construction of any building, shall have a lien or charge for the price of the work. The court, by FAOURST, V. C., remarked: "It was contended that the act only contemplated persons who applied manual labor on, or furnished materials to be used in, a building in course of construction, that an architect did neither, and that the phrase *other person* must be construed, person of the same character as those mentioned specifically in the section. The duties of an architect in preparing elevations, working-plans, specifications, superintending the construction of the building according to the plans, and seeing that proper material is used, etc., are essential things to be done in the construction of the work; and the architect seems to me if not comprehended under the designation of 'builder,' to come under that of *other person*. There is nothing to show that the person to be protected must have actually carried the stone or brick, or hewn the wood used in the building. The man who designs the building and superintends its erection as actually does work upon it as if he had carried a hod.

"Webster (Dict.) defines a *builder* as 'one who builds; one whose occupation is to build; an architect, a shipwright, a mason,' etc. In common use the signification is, I think, somewhat more restricted, and perhaps would not embrace the duties of an architect in designing the building. But he certainly is a person performing work upon the building."

In *Mulligan v. Mulligan*, 18 La. Ann. 21, a superintending architect was held to have a lien, under the statute which gives a lien to every mechanic, workman, or other person for work performed as journeyman, laborer, cartman, sub-contractor or otherwise.

In *Knight v. Norris*, 13 Minn. 475, the same was held of one who furnished plans and specifications and superintended the work upon a building, under a statute giving a lien to "whoever performs labor," etc. The court said: "The labor and skill of an architect and superintendent of the work upon a building are a part of the expense of erecting a building, and not unfrequently an indispensable and highly valuable part. As an item of such expense they enter into and help to form the value of the building, and we can conceive of no sound reason in the nature of things why the person who performs such labor, and furnishes such skill, should not receive the same protection as the carpenter, the mason, the lumber dealer, or the hardware merchant." Citing *Bk. of Penn. v. Gries*.

In *Raeder v. Bensberg*, 6 Mo. App. 445, it is "held that an architect has no lien for his services in drawing plans and specifications, and giving directions to the builder, under whose special superintendence the building was erected. The language of the statute is 'every mechanic or other person who shall do or perform any work or labor,' etc. The court say: "It seems clear enough that an architect is not a mechanic, and that he cannot be said to 'do or perform any work or labor upon a building,' when he draws and designs the plans upon which it is constructed. The statute, while it speaks of mechanics and other persons who perform work or labor upon a building, plainly does not include men of the learned professions who contribute by work not at all mechanical toward its erection." "The words 'mechanics or other persons' * * * mean other persons *cumdem generis*." "The plaintiff in the present case drew the plans, but it does not appear that he exercised any constant supervision over the workmen, or gave any minute directions. On the contrary it appears that the house was erected by a builder who followed plaintiff's plans." This case is therefore distinguishable from the principal case and those cited above; but the court criticise *Bank v. Gries*, *Mutual Benefit Co. v. Rowand*, and *Knight v. Morris*, very unnecessarily, and in saying that *Bank v. Gries* is shaken by *Railroad Co. v. Leuffer*, 84 Penn. St. 178; s. c., 24 Am. Rep. 189, are quite mistaken. They cite a recent Pennsylv.

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vania case, *Price v. Kirk*, Leg. Int., 1878, p. 325, as holding the reverse of *Bank v. Gris*. They also cite *Ames v. Dyer*, 41 Me. 397, as holding that one who draws plans for the construction of a ship gets no lien under a statute giving a lien to "any ship-carpenter, caulker, blacksmith, joiner or other person who shall perform labor or furnish materials for or on account of any ship."

Price v. Kirk, Chester Common Pleas, 35 Leg. Int. 1878, p. 325, is precisely the case in *Raeder v. Bensberg*, of an architect who simply drew plans. The court expressly recognized *Bank of Penn. v. Gries* as authority, and denied that it was overruled by *Railroad Co. v. Leuffer*. The court remarked, "an architect is not a mechanic or laborer."

In *Foushee v. Grigsby*, 12 Bush, 75, it was held that an architect or superintendent of a building is not embraced by the provisions of the statutes giving liens to mechanics, laborers, and material men, and has no lien for his services. This is so held without discussion, and probably is based on the idea that the architect is not within the defined classes of persons.

In *Smallhouse v. Kentucky, etc., Co.*, 2 Mont. 443, an agent of a corporation, employed at a monthly salary, to superintend the erection of buildings and working of mines, is held not a "mechanic, lumberman, artisan, workman, laborer, or other person," within the meaning of the mechanics' lien law. The court said: "From the nature of the plaintiff's employment, as averred by himself, it does not appear that he was an architect or laborer, or that he labored directly in the construction of the buildings, etc., but rather that he was employed by the corporation at a fixed salary to manage and superintend its affairs at the place named. Undoubtedly he had the general oversight of the business of the company, of the workmen employed to labor upon the buildings, etc., and probably kept an account of their time, saw that they performed good service and earned their wages, and at stated times paid them their money, for all of which he rendered an account to the company. His services were useful and necessary, but they contributed only in an indirect manner to the construction and erection of the buildings. He stood very much in the situation of an owner directing and managing works of his own. He was the representative of the corporation, and to the laborers under him he was the corporation at the place where the labor was performed. This was not the kind of service that entitles one to a mechanics' lien. This view of the case is in harmony with the decisions of the Supreme Court of the State of Missouri, from whence we obtained our mechanics' lien law. In the case of *Blakey v. Blakey*, 27 Mo. 39, the plaintiff brought an action to enforce a mechanics' lien for work and labor done and materials furnished in building a house for defendant. His account was as follows: 'To 114 days' services of self in working and superintending building from May 1 up to December 23, 1856, at \$3 per day, \$342.' In deciding this case the court says: 'The law gives the mechanic, builder, artisan, workman, laborer, or other person who may do or perform any work upon, or furnish materials for any building, a lien on the same to secure the payment of the work done or materials furnished, but it has no such elastic power as is claimed for it in this case, and it cannot be stretched to cover, besides the value of the work done and materials furnished, a claim for services performed by the builder for himself in superintending his own workmen.'"

In *Capron v. Stout*, 11 Nev. 304, a foreman or "boss" of mining hands was held a "laborer or person performing labor," within the mechanics' lien law.

In *Balch v. N. Y. & Oswego Millland R. Co.*, 46 N. Y. 521, the doctrine of *Aikin v. Wason* was adopted in the case of one who contracted for labor by his team of horses. The court said the statute contemplated personal service only. Two judges dissented. Precisely the contrary was held by the Wisconsin Supreme Court, April 20, 1880, in *Hogan v. O'Neil*, in respect to a statute giving a lien for "labor and services" upon logs.

In *Erricon v. Brown*, 38 Barb. 390, a consulting engineer was held not to be a "laborer or operative," within an individual liability statute. The court said: "Such words we should ordinarily apply to an entirely different class of men, to a class who obtain their living by coarse manual labor, as distinguished from professional men; men who work with their hands rather than their heads." "He would no more be included than a lawyer who rendered professional services."

In *Hoccy v. Ten Branch*, 3 Robt. 316, an overseer and book-keeper was held a "servant," within the manufacturing corporation act making stockholders individually liable for wages of "laborers, servants, and apprentices." The court said: "The word 'laborer'

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In the statute must probably be restricted to mean manual work, but 'servant' cannot be confined to mere menial service." This was followed in *Vincent v. Bamford*, 12 Abb. Pr. (N. S.) 232, as to an engineer and foreman, sometimes acting as superintendent. So in *Richardson v. Abendroth*, 43 Barb. 162, the same was held of a secretary. But this case is disapproved in *Coffin v. Reynolds*. Founded on *Richardson v. Abendroth*, is *Williamson v. Wadsworth*, 49 Barb. 294, holding (and properly, it would seem) that a civil engineer and travelling agent is a "servant" within the manufacturing corporation act. In *Conant v. Van Schaack*, 34 Barb. 87, 99, it was held that "all persons employed in the service of a railroad company, who have not a different, proper and distinctive appellation, such as officers and agents of the company," are "laborers and servant," as engineers, master mechanics, and conductors. This case, and *Erricson v. Brown*, were approved in *Coffin v. Reynolds*. In *Harris v. Norral*, 14 Alb. L. J. 432, it was held, that an assistant city editor and reporter was a "laborer" within the corporation act of 1848.

Webster defines "laborer," "one who labors in a toilsome occupation; a man who does work that requires little skill, as distinguished from an artisan;" but in "labor" he includes, secondarily, "intellectual exertion, mental effort." Thus it seems that one may perform "labor" without being a "laborer."

RICHARDSON V. HUGHITT.

(76 N. Y. 55.)

Partnership — share of the profits as compensation for services.

A partnership agreed with H. to manufacture 200 wagons for him, he advancing \$50 on each, the wagons to be sold, and H. to receive one-fourth of the profits and interest on the advances at five and a quarter per cent. Held, that this did not make H. a partner. (See note, p. 271.)

ACTION for rent due on a lease, executed in August, 1872, from plaintiff to the firm of Bench Bros. & Co. Defendant Hughitt alone answered, denying that he was a member of the firm. The defendants, Bench and Hogeboom, were partners under the name of Bench Bros. & Co., in the business of making wagons, at Auburn, for many years prior to the 1st of October, 1870. On that day Hughitt made an agreement in writing, with the firm, to lend them money, for which he was to be secured, and to receive compensation, as follows:

Bench Bros. & Co. were to make 200 lumber wagons in one year from date, warrant them and deliver them to Hughitt, and use their best efforts to sell them within the year. Hughitt was to advance to Bench Bros. & Co. fifty dollars on each wagon delivered, on the first day of each month after delivery. At the time of each advance, Bench Bros. & Co. were to render an account of sales of the wagons, for the previous month, and pay Hughitt one-fourth of

the net profits, and repay the advances with interest at five and one-quarter per cent, so far as the cash received therefor would go, and the balance in notes on interest at seven per cent, received on such sales, to be selected by Hughitt at five per cent off from their face, and to be indorsed by Bench Bros. & Co. The arrangement was extended to December 21, 1872. The defendant had judgment below.

Rollin Tracy, for appellant. Hughitt was liable as partner for the debts of the firm. Metc. on Cont. 114, 115, 117; *Greenwood v. Brink*, 3 T. & C. 742, 743; *Man. Brass Co. v. Sears*, 45 N. Y. 797; *Ont. Bank v. Hennessey*, 48 id. 545; *Parker v. Canfield*, 37 Conn. 250; s. c., 9 Am. Rep. 317; *Leggett v. Hyde*, 58 N. Y. 272; 1 Lind. on Part. & Cos. 25, 35; *Dob v. Halsey*, 16 Johns. 34; *Berthold v. Goldsmith*, 24 How. 542, 543; *Catskill Bank v. Gray*, 14 Barb. 475.

H. V. Howland, for respondent.

MILLER, J. The facts in this case are uncontradicted; and the question to be determined is whether Hughitt had such an interest in the profits of the business of Bench Bros. & Co., as to render him liable, jointly, as a partner with the other defendants, to third parties. Hughitt was to advance money upon the wagons manufactured, upon the terms provided for in the contract, and with the single exception of the provision made therein, that Bench Bros. & Co. were to pay one-fourth of the net profits upon the sales of wagons, with interest on the advances made at five and one-quarter per cent, so far as the cash received would go, and the balance in notes on interest at seven per cent. There is no question, I think, that the contract between the parties related to a loan of money alone, upon the terms stated therein. Nor am I prepared to assent to the proposition that this portion of the agreement, considering the facts connected with it, and the terms employed in the same, created a partnership between the contracting parties. The true construction of the instrument evidently is, that it was a contract between the lender and the borrower; and the provision made as to the profits was merely a mode of providing a compensation to Hughitt for the use of the money which he had advanced; and that the share of the profits which Hughitt was entitled to receive was not as a partner, but on account of the debt owing to him by the firm of Bench Bros. & Co.

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The general rule no doubt is that to constitute a partnership, there must be a community of interests *inter sese*, and that the parties should share the profits and loss. 3 Kent's Com. 23; *Pattinson v. Blanchard*, 1 Seld. 186. This, however, is not without exception, and where there is an agreement for sharing in the profits of a business, in some cases it is sufficient to establish a partnership as to third persons. See *Manhattan Brass Co. v. Sears*, 45 N. Y. 797; s. c., 6 Am. Rep. 177. And here comes in another exception to the rule last stated, which is, that where the person has no interest in the capital or business, and is to be remunerated for his services by a compensation from the profits, or measured by the profits, or what is to depend, as in case of scamen or other voyages, upon the result, it has no application. Where then one is only interested in the profits of a business as a means of compensation for services rendered, he is not a partner. *Leggett v. Hyde*, 58 N. Y. 272, 280; s. c., 17 Am. Rep. 244; *Smith v. Bodine*, 74 N. Y. 30; *Vanderburgh v. Hull*, 20 Wend. 70; *Burckle v. Eckhart*, 1 Den. 337; on appeal 3 Comst. 132; *Fitch v. Hall*, 25 Barb. 13; *Lamb v. Grover*, 47 id. 317; 1 Smith's Lead. Cas. (5th Am. ed.) 292. These cases fully sustain the doctrine laid down, that where the profits are a measure of compensation, no partnership is created. By the contract in this case, the money was advanced by Hughitt to the firm, and was in the nature of a loan. It did not constitute a portion of the capital of the firm, and was not to go into its general business. Hughitt was to be repaid principal and interest, and the wagons were only transferred to him as security for the loan. The amount of profits which were to be received by Hughitt was as a compensation for loaning the money, and not as the profits of a partner.

While the cases cited by the appellant's counsel uphold the general rule, that an agreement to share the profits is sufficient to constitute a partnership as to third persons, none of them are applicable, when it is apparent, as it is here, that the profits were merely a measure of compensation. In *Leggett v. Hyde*, *supra*, which is especially relied upon, the money was advanced with a view to a partnership, and for the benefit of Hyde himself. It was not a loan, and no interest was to be paid on the same. It was evidently not intended as a measure of compensation alone; and the defendant, Hughitt, comes directly within the very exception laid down in the opinion of the court to which we have already adverted.

In *Parker v. Canfield*, 37 Conn. 250; s. c., 9 Am. Rep. 317, cited by appellant's counsel, the defendants had been engaged in business, and some of them had advanced money, and the business was prosecuted, for a short time, under the arrangement. The parties being advised that the arrangement would make the parties so advancing the moneys partners, it was thereupon agreed that the moneys so advanced should be regarded as a loan. Notes were given accordingly, and it was agreed, that in consideration of the trouble and expense in procuring the money loaned, an accurate account of the profits should be kept, and paid, equal to one-sixth, as a compensation only for procuring the loan. It was held that the persons loaning the money were partners, liable for the debts incurred. Here was a manifest attempt to evade responsibility as partners, and hence, differs entirely from the case at bar; and while the remark of the judge, as to the liability of parties, who participate in profits, lending money to be used in business, might be very appropriate as a general rule, it has no direct application beyond this. If however it may be regarded as including all cases where advances are made, we think it is not in conformity with the rule which prevails in this State, and cannot control in the case at bar. It may also be remarked that, in the cases cited by the appellant, the party was to have a property in the profits, and not a right of action merely to recover the money loaned.

It is urged that if the relation of borrower and lender between the parties existed, the amount to be received would be largely in excess of the legal rate of interest, and upon its face, the contract would be usurious. As the defendant was only to receive less than seven per cent interest, as a fixed and certain sum, and there is no certainty that the profits, discounts, and interest agreed upon — five and one-quarter per cent — would exceed, or even amount to seven per cent, it is not apparent that the contract was usurious. But if the contract was usurious, then it was a loan of money; and it is not manifest how the plaintiff can avail himself of the usury, to recover in this action.

We have examined all the exceptions taken upon the trial to the various rulings of the court, and are unable to find, in any of them, any sufficient ground for reversing the judgment. It must therefore be affirmed.

All concur.

Judgment affirmed.

Lynch v. Mayor.

NOTE BY THE REPORTER — In *Eager v. Crawford*, 76 N. Y. 97, it was held that where money is loaned for the benefit of a business, and is to be refunded absolutely, without regard to the profits; the fact that the lender is to receive a share of the profits, to apply on the indebtedness, does not make him liable to creditors as a partner; to have that effect, the payment of the advancement must depend upon the profits. In that case, defendant C. advanced to defendant G. money to purchase the stock and fixtures of a business, which G. stated he could pay soon. C. was secured by chattel mortgage upon the property, conditioned that the sum loaned should be paid on demand, and G. agreed to pay over to him one-half of the net receipts of the business. In an action by a creditor of G., who sought to charge C. as a partner, *held*, that C. could not be held liable; that the legal presumption was, that the share of the receipts so paid over was to be applied in payment of the loan.

In *Burnett v. Snyder*, 76 N. Y. 344, two of five members of a copartnership, in their individual capacity, entered into an agreement with defendant, C. B. S., in which it was stated that it was for the interest of said firm that C. B. S. should have an interest and become a copartner, therefore it was agreed that he "is a copartner in the firm," and that he shall be entitled to receive from the other parties to the agreement one-third of the profits earned and received by each; he agreeing to pay one-third of any losses sustained by either "by reason of their connection as copartners, or otherwise, with the firm." In an action by a creditor of the firm, in which it was sought to charge C. B. S., as a partner, *held* that the agreement did not constitute him a partner, as all the partners had not joined or concurred therein; that the declaration of C. B. S. therein did not render him liable to a firm creditor, who (as was found here), did not give credit to the firm on account of that declaration; and that he did not become liable because of the agreement as to profits and losses, as he was not to take profits as such from the copartnership or its property, and had no interest therein, but simply an interest in the individual shares of two of the members after they were received by them.

LYNCH V. MAYOR.

(76 N. Y. 80.)

Municipal corporation — obstruction of surface water.

A complaint stated that a city had raised the grade of an avenue, and neglected to provide means for carrying off the rain water which fell on the avenue or to prevent such water from draining on the adjoining lands, to the injury of the plaintiff's adjacent lot. *Held*, not to state a cause of action, as there was no allegation of the diversion of any stream upon the plaintiff's land, nor of the collecting and throwing surface water upon his land, nor of the causing of any more water to flow than would have flowed if the grade had not been raised. (*See note, p. 274.*)

ACTION of damages by obstruction of surface water. The opinion states the facts. The defendant had judgment below.

Alexander B. Johnson, for appellant. If defendant diverted the surface water, so that an unusual quantity was thrown on plaintiff's land to its injury, defendant is liable. *Byrnes v. City of Cohoes*, 67 N. Y. 206; *Bustable v. City of Syracuse*, 8 Hun, 587;

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Inman v. Tripp, 11 R. I. 520 ; s. c., 23 Am. Rep. 520 ; *Neovins v. Peoria*, 41 Ill. 502 ; *City of Aurora v. Gillette*, 56 id. 132 ; *City of Aurora v. Reed*, 57 id. 29 ; s. c., 11 Am. Rep. 1 ; *City of Jacksonville v. Lambert*, 62 id. 519 ; *Pettigrew v. Evansville*, 25 Wis. 223 ; *Ashley v. Port Huron*, 35 Mich. 296 ; s. c., 24 Am. Rep. 552. Defendant was bound to provide sewers to carry off the water. *Mayor v. Furze*, 3 Hill, 615 ; *White Lead Co. v. Rochester*, 3 N. Y. 469 ; *McCarthy v. Syracuse*, 46 id. 194 ; *Nims v. Troy*, 59 id. 500 ; *Hines v. Lockport*, 50 id. 236.

D. J. Dean, for respondent.

EARL, J. The complaint does not state a cause of action. It alleges that plaintiff owned a lot, in New York city, on One Hundred and Thirtieth street, about 700 feet westerly from Eleventh avenue ; that the defendants caused the grade of the avenue to be raised twenty feet above the surface of the adjoining lands ; that they failed and neglected to provide any means of carrying off the rain water which fell upon the avenue, or to prevent such water from draining upon the adjoining lands ; that in the construction of works of a similar character, it is proper and usual to build embankments to prevent rain water from flowing over the sides of the avenue, and also to build receiving basins or sewers to carry the same off, all of which defendants failed and neglected to build ; that by reason of such neglects and failures, the rain water flowed off from the avenue upon the lot of the plaintiff, and did him great damage.

There is no allegation that defendants, by this work upon the avenue, diverted any stream of water upon plaintiff's lot, or that they collected surface water into a channel and thus threw it upon such lot, or that they caused any more water to flow upon the lot than would have flowed there if the avenue had not been raised. The substance of the complaint is that the defendants did not protect plaintiff's lot, by sewers or embankments, from the rain water which fell upon the avenue, and flowed therefrom. That the defendants did not owe the plaintiff such protection is too well settled in this State to be questioned or to require further discussion. *Wilson v. The Mayor*, 1 Den. 595 ; *Mills v. City of Brooklyn*, 32 N. Y. 489 ; *Kavanagh v. City of Brooklyn*, 38 Barb. 232.

The cause of action alleged is not like that found in the case of *Byrnes v. City of Cohoes*, 67 N. Y. 204, where the defendant con-

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structed a gutter, and in it conducted the surface water of a whole ward, which before flowed in another direction, directly to and upon the plaintiff's lands; nor like that found in the case of *Bastable v. City of Syracuse*, 8 Hun, 587, where the defendant, in substantially the same way, collected the surface water from thirty-two acres of land, which formerly flowed in another direction, and caused it to flow, in large volumes, upon the plaintiff's land. The cases cited by appellant's counsel from the Illinois Reports, *Nevins v. Peoria*, 41 Ill. 502; *City of Aurora v. Gillette*, 56 id. 132; *Same v. Reed*, 57 id. 29; s. c., 11 Am. Rep. 1; *City of Jacksonville v. Lambert*, 62 Ill. 519, are like the cases of *Byrnes v. City of Cohoes* and *Bastable v. City of Syracuse*, although there are dicta in those cases which might not be regarded as sound law in this State.

This complaint might, therefore, have been properly dismissed, upon defendant's motion, at the opening of the trial, on the ground that it did not allege a cause of action.

But the proofs were substantially as defective as the complaint. They showed that the avenue was raised ten feet. There was no evidence showing where the surface water flowed before grading of the avenue, or that any more flowed upon plaintiff's lot than before. One might guess that more did flow there, but it was incumbent upon plaintiff to prove it by satisfactory evidence. It was not shown that the surface water from a large area, as in the cases above cited, was collected into a channel and thrown upon the plaintiff's lot. The natural flow of the surface water seems to have been toward this lot, from at least two directions; and what the condition of the lot would have been, but for the raising of the avenue, cannot be known from the case.

The defendant had, at least, as much right to fill up and raise this avenue as a private owner of a city lot has to fill up and improve his lot; and there can be no question that such an owner may fill up his lot, and build upon it; and the surface water of adjoining lots may thus be prevented from flowing upon it, or the surface water may be thrown from it upon adjoining lots, and flow upon them in a different way and in larger quantities than before; and yet no liability would arise. If it were otherwise, it would be quite difficult to improve city lots, and build up a city. Each owner may improve his lot, and protect it from surface water. He may not collect such water into a channel, and throw it upon his neighbor's lot. But he is not bound, for his

neighbor's protection, to collect the surface water which falls upon his lot, and lead it into a sewer. *Vanderwiele v. Taylor*, 65 N. Y. 341; *Gannon v. Hargadon*, 10 Allen, 106.

There are no facts, in this case, which made it the imperative duty of the defendant to drain the rain water, which fell upon the avenue, into the sewer which existed in One Hundred and Thirtieth street. It is settled that a city may exercise its discretion, subject to no review or question in any court, whether, at any particular place, it will build a sewer; and what waters it will conduct into an existing sewer, and what drains it will connect therewith, must usually, for the same reason, also be within its discretion. *Dillon Mun. Corp.*, § 799.

The judgment must be affirmed, with costs.

All concur.

Judgment affirmed.

NOTE BY THE REPORTER. — See *Taylor v. Fickas*, 64 Ind. 167; s. c., 31 Am. Rep. 114; *Ross v. City of Clinton*, 46 Iowa, 606; s. c., 26 Am. Rep. 169.

In *Mayor and City Council of Cumberland v. Willison*, 50 Md. 138, the defendants, in the execution of powers conferred on them by their charter, for the paving, grading, repairing, draining, sewerage, and re-extending of the streets of the city, but with no want of reasonable care and skill in making the improvements, changed or so directed the natural flow of surface water, which usually found its way into a mill-race in the city, that a larger flow of such water than formerly was emptied into such mill-race, along a given street, and in times of heavy rains a larger quantity of mud, sand, and debris was thus carried into the race near the mill than before such improvements were made. For the injuries caused by these obstructions to the free flow of the water the owner of the mill brought suit. *Held*, that there was no ground of recovery. *Crawford v. Village of Delaware*, 7 Ohio St. 459; *Barron v. Mayor, etc., of Baltimore*, 3 Am. Jour. 203, and *News v. City of Peoria*, 41 Ill. 502, disapproved.

PEOPLE V. BAKER.

(76 N. Y. 78.)

Marriage—divorce in another State—jurisdiction.

On the trial of an indictment for bigamy, the defendant pleaded a divorce obtained by the former wife in Ohio. *Held*, that a court of another State cannot grant an absolute divorce as against one domiciled and actually abiding in this State pending those proceedings, and not personally served with process, nor notified, nor voluntarily appearing.

THE defendant was convicted of bigamy. This was reversed at General Term.

In 1871 the defendant in error was married to Sallie West, in Ohio, and in November, 1874, while she was still living, he married Eunice Nelson, at Auburn, in this State.

The defendant in error offered in evidence an exemplified copy of the record of a judgment of the Court of Common Pleas of the county of Seneca, State of Ohio, in an action by said Sallie against him for divorce. The record showed proof of service of process on defendant by publication only. There was no personal appearance by him. The judgment purported to dissolve the marriage for "gross neglect of duty," on his part. The statute of Ohio was also offered in evidence, by which it appeared that the proceedings were regular and sufficient, and the judgment was valid and binding under the laws of Ohio. The court held the evidence was incompetent for any purpose except to show the intent of defendant, and received it for that purpose only. Other facts appear in the opinion.

H. R. Selden and *S. E. Payne*, district attorney, for plaintiffs in error.

A. P. Laning, for defendant in error. If the divorce was regular and valid, and the statutory requirements of Ohio were fully met, it is entitled to full faith and credit in every State in the Union. U. S. Const., § 1, art. 4; *Livingstone v. Md. Ins. Co.*, 6 Cr. 274; *Talbot v. Seeman*, 1 id. 1, 38; *Raynham v. Canton*, 3 Pick. 293; *Consequa v. Willings*, 1 Pet. C. C. 225, 229; *Church v. Hubbard*, 2 Cr. 187, 238; *James v. Allen*, 1 Dall. 188; *Phelps v. Holker*, id. 261; *Hitchcock v. Aicken*, 1 Cai. 460, 479; *Vandervoordt v. Smith*, 2 Cai. 155; *Yeaton v. Fry*, 5 Cr. 335, 343; *McElmoyle v. Cohen*, 13 Pet. 312; *D'Arcy v. Ketchum*, 11 How. 165; *Thompson v. Whitman*, 18 Wall. 457; *Mills v. Duryee*, 7 Cr. 481; *Hampton v. McConnell*, 3 Wheat. 234; 1 Kent's Com. 243, 244; *U. S. v. Amedy*, 11 Wheat. 392; *Buckner v. Finley*, 2 Pet. 592; *Owings v. Hall*, 9 id. 627; *Stacey v. Thrasher*, 6 How. 44; *Bk. of Alabama v. Dalton*, 9 id. 522; *Booth v. Clark*, 17 id. 322; *Craig v. Brown*, Pet. C. C. 354; *Gardner v. Lindo*, 1 Cr. C. C. 78; *Turner v. Waddington*, 3 Wash. C. C. 126; *Callin v. Underhill*, 4 McL. 199. A wife may acquire a separate domicile whenever necessary or proper. *Cheever v. Wilson*, 9 Wall. 108, 123; *Strader v. Graham*, 10 How. 82; *Bennett v. Bennett*, Deady, 299; 2 Bish. on Mar. and Div. 475; *Barber v. Barber*, 21 How. 582; *Cannel v. Buckle*, 2 P. Wms. 243, 244; *Ex parte Strangeways*, 3 Atk. 478; *Brooks v. Brooks*, Pr. Ch. 24; *Denton v. Denton*, 1 Johns. Oh. 364; *Purcell v. Purcell*, 4 Hen. & Munf. 507; *Williams v. Donner*, 16 Jur. 336; 9 Eng. L. & Eq. 598; *Pennell v.*

Wilson, 2 Robt. 505. It is sufficient that one of the parties be domiciled in the country, and the citation need not be served personally. 2 Bish. on Div. (5th ed.) 148, § 163 a; *Ditson v. Ditson*, 4 R. I. 87, 102, 103; *Pennoyer v. Neff*, 95 U. S. 714; Code, § 438, sub. 4; *Shafer v. Bushness*, 24 Wis. 372, 376, 377; *People v. Hovey*, 5 Barb. 117; Cooley's Const. Lim. (2d ed.) 401, and note; *Irby v. Wilson*, 1 Dev. & Bat. Eq. 568; *State v. Schlachter*, Phillips' N. C. 520; *Harding v. Alden*, 9 Greenl. 140; 2 Kent's Com. (6th ed.) 110, n.; *Mansfield v. McIntyre*, 10 Ohio, 27; *Tolen v. Tolen*, 2 Blackf. 407; *Hull v. Hull*, 2 Strobl. Eq. 174; *Cooper v. Cooper*, 7 Ohio, 238; *Harrison v. Harrison*, 16 Alb. L. J. 499; *Gleason v. Gleason*, 4 Wis. 64; *Thompson v. The State*, 28 Ala. 12; *Hood v. Hood*, 11 Allen, 196; *Beard v. Beard*, 21 Ind. 321; *Rhym's v. Rhym's*, 7 Bush, 316; *Wilcox v. Wilcox*, 10 Ind. 436; *Schreck v. Schreck*, 32 Tex. 578; *Ponsford v. Johnson*, 2 Blatchf. 51; *Dickson v. Dickson*, 1 Yerg. 110; Shelf. on Mar. & Div. 476, 478; 4 Kent's Com., § 54; 2 Bl. Com. 130; *Day v. West*, 2 Edw. Ch. 596; 5 Barb. 117; Story's Conflict of Laws, §§ 620, 621; *People v. Hovey*, 5 Barb. 117; 3 R. S. (6th ed.) 964, part 4, ch. 1, art. 2, § 13; 1 Hale's Pl. Cr.; 1 R. L. 113; *Baker v. People*, 2 Hill, 325; 2 Bish. on Mar. & Div., § 164; *Borden v. Fitch*, 15 Johns. 127; *Bradshaw v. Heath*, 13 Wend. 407; *McGiffert v. McGiffert*, 31 How. 69; *People v. Dawell*, 25 Mich. 247.

FOLGER, J. As we look at this case, it presents this question: Can a court, in another State, adjudge to be dissolved and at an end the matrimonial relation of a citizen of this State, domiciled and actually abiding here throughout the pendency of the judicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that State?

We assume, in putting this proposition, that the defendant in error was in the situation therein stated. We think that it may properly be thus assumed. It is true, that the first which is disclosed of the defendant in error, by the error-book, shows him in another State, in the act of marriage with Sallie West, the other party in the judicial proceedings there held. It does not appear where his domicile then was, nor where it had been. After the marriage, however, the persons then married, resided at Rochester, in this State, at a time prior to the commencement of those judicial

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proceedings ; and he continued to reside in that city until in 1875, and after the final judgment therein was rendered. We look in vain in the error-book for any exception, proposition or suggestion, which presents or indicates that the case was tried at the sessions, upon the theory or contention that the defendant in error was domiciled in Ohio, or temporarily abiding there, at any time during the pendency of the judicial proceedings in that State.

We come back then to the question we have above stated. We are ready to say, that as the law of this State has been declared by its courts, that question must be answered in the negative. The principle declared in the opinions has been uniform. Such is the utterance in *Borden v. Fitch*, 15 Johns. 121 ; *Bradshaw v. Heath*, 13 Wend. 407 ; *Vischer v. Vischer*, 12 Barb. 640 ; *Kerr v. Kerr*, 41 N. Y. 272 ; *Hoffman v. Hoffman*, 46 id. 30 ; s. c., 7 Am. Rep. 299. Nor does it avail against them to say, that the facts of those cases do not quadrate exactly with those of the case before us. The utterances, which we speak of, were not inconsiderate expressions, nor *dicta* merely. They were considerate steps in the reasoning, leading to the solemn conclusion of the court. And as touching the question in its general relations, we may cite *Kilburn v. Woodworth*, 5 Johns. 37 ; *Shumway v. Stillman*, 4 Cow. 292 ; s. c., 6 Wend. 447, and *Ferguson v. Crawford*, 70 N. Y. 253 ; s. c., 26 Am. Rep. 589, where the whole subject is elaborately considered. We know of no case in our courts which has questioned the principle declared in these authorities. *Kinnier v. Kinnier*, 45 N. Y. 535 ; s. c., 6 Am. Rep. 132, — sometimes claimed to be a departure — does not. It is recognized there, that to make valid in this State a judgment of divorce, rendered by a court of another State, that court must have “the parties within its jurisdiction,” must “have jurisdiction of the subject-matter and of the parties,” who “must be within the jurisdiction of the court.” *Hunt v. Hunt*, 72 N. Y. 217 ; s. c., 28 Am. Rep. 129, does not. That case was close. It went upon the ground, built up with elaboration, that both parties to the judgment were domiciled in Louisiana when the judicial proceedings were there begun and continued and the judgment was rendered, and were subject to its laws, including those for the substituted service of process. We meant to keep the reach of our judgment within the bounds fixed by the facts in that case.

We must and will abide by the law of this State, as thus declared, unless the adjudications in which it has been set forth have

been authoritatively overruled in that regard. As this is a question of Federal cognizance, we ought to inquire whether the National judiciary has declared any thing inconsistent therewith. *Cheever v. Wilson*, 9 Wall. 108, is cited. Clearly that case is not applicable. There both the parties to the judgment made a voluntary appearance, and the divorce court had jurisdiction of their persons, as it had of the subject-matter. "It had jurisdiction of the parties, and the subject-matter," says the opinion in the case cited. It had jurisdiction of the plaintiff in the divorce proceedings, by her voluntary appearance in court, as a petitioner, and showing a *bona fide* residence in that State, in the way fixed therefor by its statute law. It had jurisdiction of the person of the defendant, by his voluntary appearance in the court, and putting in a sworn answer to the petition. The *dictum* in the case of *Pennoy v. Neff*, 95 U. S. 714, even had it the force of a judgment, does not go to the extent needed, to overrule these decisions in our State. It is there held, that to warrant a judgment *in personam*, there must be personal service of process, or assent in advance to a service otherwise. It is also said, that a State may authorize judicial proceedings to determine the *status* of one of its own citizens toward a non-resident, which will be binding within the State, though had without personal service of process or appearance. It is not said, much less is it authoritatively decided, that a judgment thus got may do more than establish the *status* of the parties to it, within the State in which the judgment is rendered. The case just cited is the latest annunciation known to us of the Supreme Court of the United States. It does not overrule the declarations of our own courts. It rather sustains them. We must and do concede, that a State may adjudge the *status* of its citizen toward a non-resident; and may authorize to that end such judicial proceedings as it sees fit: and that other States must acquiesce, so long as the operation of the judgment is kept within its own confines. But that judgment cannot push its effect over the borders of another State, to the subversion of its laws and the defeat of its policy; nor seek across its bounds the person of one of its citizens, and fix upon him a *status*, against his will and without his consent, and in hostility to the laws of the sovereignty of his allegiance.

It is said, that a judicial proceeding to touch the matrimonial relation of a citizen of a State, whether the other party to that relation is or is not also a citizen, is a proceeding *in rem*, or as it is

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more gingerly put, *quasi in rem*. But it was never heard, that the courts of one State can affect in another State the *rem* there, not subjected to their process, and over the person of the owner of which no jurisdiction has been got. Now, if the matrimonial relation of the one party is the *res* in one State, is not the matrimonial relation of the other party a *res* in another State? Take the case of a trust, the subject of which is lands in several States, the trustees all living in one State. Doubtless the courts of a State in which the trustees did not live and never went, but in which were some of the trust lands, could proceed *in rem* and render a judgment without personal service of process, which would determine there the invalidity of the trust and affect the possession and title of the land within the jurisdiction of those courts; but it would not be contended, that the judgment would operate upon the trustees or upon the trust lands, in other States, so as to affect the title, or the possession, in those States. It could operate only on the *rem* upon which the process of those courts could lay hold. And why is not the matrimonial relation of a citizen of New York, as it exists in that State, if it is a *res*, as much exempt from the effect of such a judgment as lands in that State, and the trust under which they may be held? Is not any other relation of mankind as much a *res* for the touch and adjudication of courts as that of husband and wife? Take the relation of a minor orphan to its guardian, or to those entitled by law to be its guardians. That is a *status*, in kind as the matrimonial relation. The courts of one State may act and appoint a guardian for such a child, if it is within their territorial jurisdiction, and remains there; but the appointment is not operative *per se* in another State, into which the child goes. *Woodworth v. Spring*, 4 Allen, 321. It is, of course, to be granted, as before said, as a general proposition, to which it is not now needful to suggest limitations, that each State may declare and adjudge the *status* of its own citizens. And hence, if one party to a proceeding is domiciled in a State, the *status* of that party, as affected by the matrimonial relation, may be adjudged upon and confirmed or changed, in accordance with the laws of that State. But has not the State, in which the other party named in the proceedings is domiciled, also the equal right to determine his *status*, as thus affected, and to declare by law what may change it, and what shall not change it? If one State may have its policy and enforce it, on the subject of marriage and divorce, another

may. And which shall have its policy prevail within its own borders, or shall yield to that of another, is not to be determined by the facility of the judicial proceedings of either, or the greater speed in appealing to them. That there is great diversity in policy is very notable. It does not, however, seem to tend to a state of harmonious and reliable uniformity, to set up the rule that the State in which the courts first act shall extend its laws and policy beyond its borders, and bind or loose the citizens of other sovereignties. It will prove awkward, and worse than that, afflictive and demoralizing, for a man to be a husband in name and under disabilities or ties in one jurisdiction, and single and marriageable in another. Yet it is only in degree that it is harder than the results of other conflicts in laws. It is more sharply presented to us, because tenderer, more sacred, more lasting relations, of greater consequence, are involved; and because the occasions calling attention to the conflict have, of late years, become so frequent. Whatever we may hold in the United States, it will not change results in foreign countries. And in seeking for a rule which shall be of itself, from its own reason, correct, we ought to find or form one, if may be, that is generally applicable. However submissively we must concede to every sovereignty the right to maintain such degree of strictness in the domestic relations as it sees fit, within its own territory, there is no principle of comity which demands that another sovereignty shall permit the *status* of citizens to be affected thereby, when contrary to its own public policy, or its standard of public morals.

We are not, therefore, satisfied with the doctrine that rests the validity of such judicial proceedings upon the right and sovereign power of a State to determine the *status* of its own citizens, and because it may not otherwise effectually establish it, asserts the power to adjudge upon important rights, without hearing the party to be affected, and without giving him the notice which is required by the principles of natural justice, he being all the while beyond its jurisdiction.

Besides, a just consideration of what is a proceeding *in rem*, and of the effect of a judgment therein, shows that the latter does not reach so far as is contended for it. It is a proceeding *in rem* merely. The judgment therein is not usually a ground of action *in personam* in another jurisdiction, for, as a proceeding *in personam*, or as giving foundation for one, the court gets no jurisdiction. *Paulding v. Bird's Exrs.* 13 Johns. 192. How then, upon such

basis, can the judgment be brought here and made the foundation of an action against one personally ; and if not a means of offense *in personam*, how a means of defense to the person, when sought to be held for personal acts, in violation of the laws of his allegiance ?

The consequences of such want of harmony in polity and proceeding we have adverted to. The extent of them ought to bring in some legislative remedy. It is not for the courts to disregard general and essential principles, so as to give palliation. Indeed, it is better, by an adherence to the policy and law of our own jurisdiction, to make the clash the more and the earlier known and felt, so that the sooner may there be an authoritative determination of the conflict.

It is urged upon us that our State cannot with good grace hold invalid this judgment of a court of Ohio, when our own Code provided, at the time of the rendition of it, for the giving of judgment of divorce against a non-resident, by like substituted service. It is true, that until the new Code of Procedure, such had been the case, 2 R. L. 197, § 1 ; 1 id. 489, § 9 ; 2 R. S. 144, § 38 ; id. 185 ; id. 187, § 134 ; Laws of 1862, ch. 246, § 1 ; Old Code, § 135 ; but see New Code, § 438, sub. 4. This is but to say that on the principle of the comity of States, we should give effect to this judgment. But this principle is not applied when the laws and judicial acts of another State are contrary to our own public policy, or to abstract justice or pure morals. The policy of this State always has been, that there may of right be but one sufficient cause for a divorce *a vinculo* ; and that policy has been upheld, with strenuous effort, against persistent struggles of individuals to vitiate and change it. And though it is lightly, we must think, sometimes said that it is but a technicality that there must be personal notice and chance to be heard, to make a valid judgment affecting personal rights and conditions, we cannot but estimate the principle as of too fundamental and of too grave importance not to be shielded by the judiciary, as often as it is in peril.

We are aware that there are decisions of the courts of sister States to the contrary of the authorities in this State. They are ably expressed ; they are honestly conceived. They are, however, on one side of a judicial controversy, the dividing line whereof is well marked, and is not lately drawn. It would not be profitable to review and discuss them. They are prevalent within the jurisdic-

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tions in which they have been uttered, and we cannot expect to change them there. They are in opposition to the judgments of our own courts, which we must respect, and with which our reason accords. It remains for the Supreme Court of the United States, as the final arbiter, to determine how far a judgment rendered in such a case, upon such substituted service of process, shall be operative, without the territorial jurisdiction of the tribunal giving it.

There is an exception still to be noticed. The court, in charging the jury, stated to them that if the divorce had been obtained under the laws of this State, though the defendant in error would not have been guilty of the crime of bigamy, yet he would have been guilty of a misdemeanor, and that that was a pertinent consideration for them. We do not understand that this was meant for an instruction that they could convict him of the misdemeanor, if they did not find that he was guilty of the higher offense. The charge is to be taken in connection with the reception in evidence of the Ohio record, on the question of his intent. As bearing merely upon his guilty or innocent purpose, it was not inappropriate for the jury to consider, that though a man, from whom his wife has been divorced *a vinculo*, in this State may not, by marrying again, incur the penalties for bigamy, he does violate the decree, which forbids to him another marriage, so long as she lives.

We are of the opinion that the judgment of the General Term should be reversed, and that of the Sessions be affirmed.

All concur, except CHURCH, C. J., dissenting.

Judgment accordingly.

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(76 N. Y. 92.)

Negligence — of innkeeper letting public hall.

The plaintiff had been attending a ball at a public hall in the third story of an inn, and on coming away, instead of descending two flights of stairs, went out of a door left unlocked at the foot of the upper flight, and opening upon the roof of a piazza, and walking along the piazza roof stepped off the unguarded end of it, and fell to the ground. A verdict for the plaintiff against the innkeeper sustained, on the ground that by letting the hall be held it out to the public as safe, and was bound to render approach and egress safe.

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ACTION of negligence. The opinion states the facts. The plaintiff had judgment below.

F. C. Peck, for appellant. Defendant owed no duty to plaintiff to protect him while in the house. *Nicholson v. Erie R. Co.*, 41 N. Y. 525; *Southcole v. Stanley*, 1 H. & N. 247; *Lester v. Lantz*, Sup. Ct. of Buffalo, Oct., 1876; *Matze v. N. Y. C. & H. R. R. Co.*, 1 Hun, 419; *Huns v. Smith*, 97 Eng. C. L. 731; *Bolch v. Smith*, 7 H. & N. 736; *Gautret v. Edgerton*, L. R., 2 C. P. 371; *Indemaur v. Dames*, id. 311; *Smith v. Dock Co.*, 3 id. 326; *Chapman v. Rothwell*, 96 Eng. C. L. 163; *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Sweeney v. Old Col. & N. R. R. Co.*, 10 Allen, 368; *Zoebisch v. Tarbell*, 10 id. 385; *Murray v. McLean*, 57 Ill. 378; *Pierce v. Whitcomb*, 48 Vt. 127; s. c., 21 Am. Rep. 120. The negligence of plaintiff having contributed to the injury, he should have been nonsuited. *Wilds v. H. R. R. Co.*, 24 N. Y. 430; *Johnson v. H. R. R. Co.*, 20 id. 65; *Ernst v. H. R. R. Co.*, 24 How. Pr. 97.

Geo. M. Osgoodby, for respondent.

ANDREWS, J. The plaintiff brings this action to recover damages for a personal injury sustained by his falling from a piazza or wooden awning, erected on the west side of the defendant's house. The awning was constructed by laying a floor of boards upon timbers supported by irons anchored in the wall of the building and braced. It was six feet wide and twelve feet above the sidewalk, and a door at the front of the hall in the second story of the house opened upon it. The defendant kept an inn on the premises, and in the third story of the inn was a hall, which he let for public purposes. The hall was reached by two flights of stairs from the street, one directly above the other. The entrance from the street was by a door opening into a hall-way opposite the foot of the stairs; and the door and stairway in the second story occupied the same relative position to each other as the door and stairway below.

The defendant had let the hall, on the evening when the plaintiff was injured, for a dance, to which all persons who applied were admitted, on payment of an entrance fee. The plaintiff went to the hall, paid the entrance fee, and was admitted, and about eleven o'clock in the evening left the hall to go home, and after passing down the first flight of stairs,—supposing that the door opening on to the awning was the street door,—stepped out of that door

and walked southerly along the side of the house upon the awning, for the distance of about forty feet, until he reached the end and was precipitated to the ground, and received the injury in question. The night was dark, and there was no guard or railing to the awning. The plaintiff had drank liquor several times before going to the hall, and the extent of his intoxication was a subject of controversy on the trial.

The question whether the door in the second story was left open during the evening was also the subject of controversy. The defendant sought to establish, by proof of declarations made by the plaintiff after the accident, that the door was locked when he came down stairs, and that he unlocked and opened it when he went out. The plaintiff denied having made the declarations testified to by the defendant's witnesses, and he testified that the door was open when he came from the hall. In this he is corroborated by several witnesses. The facts proved justified the jury in finding that it was dangerous to leave the door open, and that persons not familiar with the premises might, in the night time, without being chargeable with negligence, mistake this door for the street door, and go on to the awning, under the impression that they were going on to the sidewalk. Two other persons, on the same evening, who were perfectly sober, went out upon the awning, under this mistake, although they discovered the situation in time to avoid injury. One of these persons, who left the hall earlier than the plaintiff, testified that he discovered his mistake by hearing noise below him and the voices of people walking in the street. The evidence also shows that the defendant understood the danger of allowing the door to be open, when there was a meeting in the hall. He early in the same evening expressed to a witness the apprehension that some one would be injured there; and he testifies that in consequence of this, he locked the door. If he did lock it at this time, it is quite satisfactorily established that it was soon opened again, and that it remained open most of the evening, and that this was or might have been known to the defendant.

It is insisted that he owed no duty to the plaintiff which imposed upon him any obligation to make the premises safe, and to see, so far as he reasonably could, that the door was kept closed, so as to prevent accidents. This claim cannot, we think, be maintained. He let the premises for hire, and it is admitted by the pleadings that the public were invited to the hall, with his consent and

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knowledge, whenever it was let for a public purpose. The plaintiff was rightfully there, upon the invitation of the managers of the entertainment implied from the public character of the assembly, their accepting the entrance fee paid, and his admission to the hall. It is not the case of the owner of premises, who gives a bare license or permission to another to enter. The licensee who enters under such a license takes the risk of the ordinary dangers resulting from the faulty construction or arrangement of the premises. In this case, the defendant, by letting the hall for public purposes, held out to the public that the hall was safe, and he was bound to exercise care to provide safe arrangements for the entrance and departure of people, who came there upon his invitation.

The question whether there was a breach of this duty was, upon the evidence, properly submitted to the jury. The question of the plaintiff's negligence was, we think, a question for the jury also. The fact that he had been drinking, and was, to some extent, affected thereby, was admitted. But the extent of his intoxication, and whether it contributed to his injury, was a matter upon the evidence to be determined by the jury. It was a very important consideration bearing upon the point of contributory negligence, and it is quite probable that the jury did not give a sufficiently favorable construction to the evidence upon this question, in favor of the defendant. But this court does not sit to correct the mistakes of juries in weighing evidence. That duty devolves upon the General Term. It is our province to review questions of law, and where there is evidence to support a verdict, we cannot reverse it because we think the jury, upon a controverted question, came to a wrong conclusion.

The judgment should be affirmed.

All concur, except RAPALLO, J., not voting.

Judgment affirmed.

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ST. VINCENT ORPHAN ASYLUM V. CITY OF TROY.

(76 N. Y. 108.)

Municipal corporation — inclosure of street for private use.

A common council of a city have no right to give permission to a citizen to inclose for private use any part of a public street, except by statutory proceedings to alter or diminish the width thereof, and such an encroachment will not ripen into a right by twenty years' use.

ACTION of trespass. Answer that the *locus in quo* was a public street of the city of Troy, and that the acts complained of were lawfully done by the city authorities in the maintenance and control of said street.

In 1853, Havermans owned and was in possession of a lot on the south-west corner of Washington and Hill streets, in Troy, bounded north by Washington street, and west by Hill street, on which he erected the Troy hospital. The plaintiff succeeded to his title. On the 24th of August, 1853, the common council of Troy resolved to reduce the width of Hill street, southerly from Washington street, to forty feet, and directed the excess beyond forty feet to be laid off on the east side of the street; and further declared that the Troy hospital might inclose the excess within its grounds for the use of that institution. The east line of Hill street was immediately fixed accordingly by the city surveyor, leaving the street forty feet wide; and the lot on the east side was from that time occupied, and improvements were made with a view to such designation of the street line; a heavy and permanent wall was built along the line so designated, and maintained by Havermans and those holding under him until April, 1874, when the city authorities commenced its removal.

In July, 1868, the common council resolved to revoke the former resolution and the permission therein given. In December, 1873, the common council directed the city engineer to remove the wall, which he commenced to do when he was restrained by injunction. This was the trespass complained of. The court directed a verdict for plaintiff. Other facts appear in the opinion.

R. A. Parmenter, for appellant.

Olin A. Martin, for respondent. The common council had power to establish the boundary of the street as it did by the resolution

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of 1853. Charter City of Troy, passed April 12, 1816, § 15. Defendant having fixed the boundary, and plaintiff having in reliance thereon permanently improved and occupied the land up to that line, the defendant is estopped from denying it to be the true boundary line of the street. *Brown v. Bowen*, 30 N. Y. 519; *Hogan v. City of Brooklyn*, 52 id. 286; *Corkhill v. Landers*, 44 Barb. 219; *Regina v. Chorley*, 12 Q. B. 515. The fee in the soil to the center of the street was in plaintiff and its grantors as adjoining owners. *Bissell v. N. Y. C. and H. R. R. Co.*, 23 N. Y. 61; *Perrin v. N. Y. C. and H. R. R. Co.*, 36 id. 120; *Herring v. Fisher*, 1 Sandf. 344, 348. Upon the reduction of the width of the street and the abandonment of the excess the easement therein was relinquished and vacated, and the adjoining owner was restored to his original dominion in the soil, discharged of the easement. 3 Kent's Com. (10th ed.) 573, and note b; *Jackson v. Hathaway*, 15 Johns. 447; *Corning v. Gould*, 16 Wend. 531; *In re John and Cherry Sts.*, 19 id. 675; Ang. on Highways, § 326; *Harris v. Elliott*, 10 Pet. 25-26. The resolution of 1853 operated as an abandonment of the easement, 3 Kent's Com. 609, n. 1; 1 Add. on Torts (D. & B.'s ed.), 161; *Winter v. Broockwell*, 8 East, 308; *Moore v. Rawson*, 3 B. & C. 332; *Liggins v. Inge*, 7 Bing. 682; *Jamieson v. Millemann*, 3 Duer, 260; *Reg. v. Inhabitants of Bedfordshire*, 4 E. & B. 535-542; *Dyer v. Sanford*, 9 Metc. 395; 1 Wash. on Real Prop. 401; *Morse v. Copeland*, 2 Gray, 302; *Cartwright v. Maplesden*, 53 N. Y. 622; 2 Wash. on Real Prop. (4th ed.) 372; Gale and W. on Easements. Plaintiff's possession was adverse. *La Frombois v. Jackson*, 8 Cow. 618; *Smith v. Lorillard*, 10 Johns. 356; *Jackson v. Woodruff*, 1 Cow. 285. The fact that the *locus in quo* may have previously been part of a highway, or that the defendant is a municipal corporation, does not avoid the effect or change the character of plaintiff's possession. *Knight v. Heaton*, 22 Vt. 480; *Lessee, etc., v. First Presb. Ch.*, 8 Ohio, 298; *City of Cincinnati v. Evans*, 5 Ohio St. 594; *Evans v. Erie Co.*, 66 Penn. St. 222; *Rowan's Exrs. v. Portland*, 8 B. Monr. 232, 259; *Dudley v. Trustees, etc.*, 12 id. 610, 617; 3 Kent's Com. 607, n; *Hillary v. Waller*, 12 Ves. 265; *Peckham v. Henderson*, 27 Barb. 213. The non-user shown by the undisputed evidence in the case was sufficient to extinguish the easement claimed on the part of the defendant. *Corning v. Gould*, 16 Wend. 531; 3 Kent's Com. 600; 2 Wash. Real. Prop. (4th ed.), 339; Gale on Easements (3d ed.), 353, 354.

Per CURIAM. It seems clear that the direction of a verdict for the plaintiff can only be sustained, if at all, upon the resolution of the common council of the defendant, passed on the 24th August, 1853. There was evidence that the *locus in quo* was previous to that date a part of the street which was then at least fifty feet wide, and the wall built by the plaintiff was shown to encroach upon the east side of the street as then existing, several feet. In fact, it appears from the testimony of Mann, the source of plaintiff's title to the hospital lot, that the claim of the plaintiff was under that resolution, and its fence and wall was built there under the permission contained therein.

The important question, therefore, in the case is, as to the validity of that resolution.

We are unable to see in it any exercise or attempt to exercise the power to ascertain, designate, establish, widen or alter a street, given either by the original charter of 1816 or the amended act of 1834. The provisions of those acts applicable to such proceedings do not seem to have been followed. It is said that in the case of "altering" a street by narrowing it no proceedings to condemn land are necessary, because no land is taken. As the act of 1834 is peremptory in requiring that when any of the improvements authorized, including the "altering" of streets, are entered upon, the proceedings prescribed must be taken (Laws of 1834, p. 548, § 2), the argument is strong that such "altering" did not cover the abandonment of a street, or a portion thereof, to encroachments not for public purposes but for the accommodation of private persons.

But irrespective of that consideration, the resolution of August, 1853, seems to us to be not so much an alteration of the street as an attempt to give to the plaintiff permission to inclose for an indefinite period, and use for its own convenience, a part of the public street already ascertained and established. See *Indianapolis v. Miller*, 27 Ind. 394. This we can find no power in the common council to do, any more than under the pretense of alteration to completely close up a street by resolution without legislative authority. It can be easily seen how dangerous and mischievous such a power might be, and it should not be inferred, in the absence of express language in the charter. See *Lackland v. R. R. Co.*, 31 Mo. 180; *State v. Mobile*, 5 Port. (Ala.) 279; *Atty.-Genl. v. Heishon*, 18 N. J. Eq. 410.

Our conclusion is, that the resolution was unauthorized and in-

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sufficient to transfer any title to the plaintiff or to extinguish the easement of the public in the part of the street obstructed.

It is urged, however, that under the resolution, although invalid, the plaintiff's exclusive occupation of the street for twenty years has extinguished the public easement by adverse possession. This point is not without difficulty, but we have concluded that the plaintiff's occupation, at least previous to the rescission by the common council in 1868, was not an adverse possession within the statute of limitations.

The occupation of a grantee of the fee is perhaps hostile to his grantor, but not so as to a licensee. *Babcock v. Utter*, 1 Abb. Ct. App. Dec. 27; *Jackson v. Babcock*, 4 Johns. 418; *Luce v. Carley*, 24 Wend. 451; 1 Wash. on Real Prop. 400, *n.*, and cases cited.

It may well be, as the plaintiff's counsel contends, that if the license had been valid and acted upon, it would have been irrevocable, as between private persons, as being upon the land of the licensee. But although we hold it invalid, the entry of the plaintiff was nevertheless under it, and in the language of SELDEN, J. (1 Abb. Ct. App. Dec. 37), "the holding is not adverse." If the license were valid and irrevocable, the plaintiff's right would be perfect, but not by expiration of time. The moment it was acted upon, as plaintiff contends, the easement would be extinguished. The lapse of twenty years would hardly strengthen this right, which would not arise from the possession being adverse, for as we have seen, possession under a license is not adverse. The license, being invalid and void, could of course be the foundation of no right in the plaintiff, but its entry and occupation thereunder was nevertheless no more adverse to the defendant than if the license had been valid. After the resolution of 1868, the possession may perhaps be regarded as in defiance of the defendant and adverse to it, but not before that time.

There is another more decisive answer to the plaintiff's claim that it has acquired a right to maintain this encroachment upon the public street by adverse possession. It seems to be the settled law that the long continuance of such encroachments, although for more than twenty years, cannot destroy the public right or take away the authority of the public officers to remove and abate them. *Walker v. Caywood*, 31 N. Y. 51; *Kittaning Academy v. Brown*, 41 Penn. St. 270; *Mills v. Hall*, 9 Wend. 315; *Milbau v. Sharp*, 27 N. Y. 611, 622. The defendant's duties, as commissioner of highways, differ with regard to the control of the streets from its rights

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as a mere proprietor of property. Those duties are to some extent governmental, for the benefit of the public, and the public cannot be barred by their neglect.

These conclusions render unnecessary a consideration of the point upon which the judges differed at General Term.

The judgment must be reversed and new trial granted, costs to abide the event.

All concur, except CHURCH, C. J., not voting.

Judgment reversed.

ROHRSCHEIDER V. KNICKERBOCKER LIFE INSURANCE CO.

(76 N. Y. 216.)

Insurance—fraudulent representations of insurer—estoppel.

The defendant advertised and represented that its patrons could be insured at half the expense of insuring in other companies, by paying half the premiums in cash and giving notes for the other half, the dividends always paying the notes. The dividends never had paid the notes, but generally fell far short, as the managers knew. The plaintiff procured an endowment policy for \$500 payable in five years, paying half cash and giving notes for the other half. Only one small dividend was made during the term. At the end of the five years the plaintiff demanded the \$500, but the defendant refused to pay more than the difference after deducting the amount due on the notes. *Held*, that an action for fraud was maintainable, that the plaintiff was not estopped by the delay, and that the measure of recovery would be the money paid and interest.

ACTION of damages for fraud. The opinion states the facts. The defendant had judgment below.

Henry Wehle, for appellant.

Samuel Hand, for respondent. Plaintiff by retaining the policy and acting under it was bound to abide by its terms. *Kirkland v. Dinsmore*, 2 Hun, 50; Am. Law Reg., Nov. 1865, p. 10; *Brees v. U. S. Telegraph Co.*, 48 N. Y. 132; s. c., 8 Am. Rep. 526; *Chapman v. Rose*, 56 N. Y. 137; s. c., 15 Am. Rep. 401; *Phillip v. Gallant*, 3 N. Y. Sup. Ct. (T. & C.) 618; *Empire State Life Ins. Co. v. Beckwith*, 5 Hun, 122. The contract having completely matured, no rescission could take place. *Franklin v. Miller*, 4 Ad. & Ell. 599; *Hunt v. Silk*, 5 East, 449; *Wheaton v. Baker*, 14 Barb. 594; *Cobb v. Hatfield*, 46 N. Y. 533; *Bedell v. Bedell*, 3 Hun, 580; 2 Para. on

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Cont. 191; *Ely v. Mumford*, 47 Barb. 632; *Baker v. Robbins*, 2 Den. 136; *Fisher v. Conant*, 3 E. D. Smith, 199; *Wheaton v. Baker*, 14 Barb. 594.

Per CURIAM. Upon the former hearing of this cause, an obscure but very material interlineation in the printed case was overlooked, and we were thus led into error. We have reconsidered the case, and by reading the evidence as corrected by the interlineation, have reached a different conclusion.

In 1867, and prior thereto, the defendant caused certain advertisements to be published in German newspapers, printed in the city of New York, and also caused German pamphlets to be published and circulated, for the purpose of inducing German speaking people to insure with it. Among other things, it was represented in the advertisements and pamphlets that a person could get as much insurance in this company as in any other with half the money; and it was explained that this could be achieved in this way: one-half of the premiums could be paid in cash, and the other half in premium notes which would never have to be paid, as the dividends of the company always had and would pay such notes. The plaintiff claims that she read some of these advertisements, and that one of the pamphlets was given to her by an authorized agent of the defendant; and that in reliance upon these and other representations, she took an endowment policy, dated February 11, 1867, from the defendant, insuring her life for \$500, payable at her death, or at the end of five years, if she should then be living. During the five years, she paid in cash one-half of the stipulated premiums, and gave her notes for the other half. As we understand the evidence, at the end of each year the note of the prior year was included with the amount for that year, and the last note given by her was for \$305. This was given at the commencement of the fifth year, and was for the whole amount of the annual premiums not paid in cash, less a dividend of ten dollars, which had been applied. In addition to this note, she had paid in cash about \$389. At the end of the five years, when she went to the defendant to claim the \$500 insured, it offered her only \$195, the difference between the \$500 and the amount of her note. She refused to take that sum, and then commenced this action, to recover damages for the fraud which she claimed had been practiced upon her.

The fraud was really undisputed. The managers of the defendant had made the false representations, and they knew them to be

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false, as the dividends of the company never had paid the notes thus given for the one-half of the annual premiums. But on the contrary, such dividends had always fallen far short of making such payments; and they must have known that they generally, if not always, would fall short. There was, in fact, no foundation or excuse whatever for making the untrue representations. Upon this policy, the only dividend, during the whole five years, was ten dollars.

It is said, on behalf of the defendant, that the plaintiff did not rely upon these representations, and was not induced by them to take the policy. But there was sufficient evidence from which the jury could have found that she did thus rely and was thus induced; and as she was nonsuited, this branch of her case must be assumed here to have been established.

It cannot be doubted that this was an actionable fraud. It was not like the usual commendation of his own which one may make with impunity when engaged in trade or traffic. It was the representation of a specific fact quite material to the transaction.

But the plaintiff was defeated in the Supreme Court, on the ground that she had so far acted upon her contract with the defendant and ratified it that she was estopped, after the policy had run to maturity, from claiming any thing on account of the fraud. We cannot agree to this. She did not discover the fraud, and so far as we can perceive, had no means of discovering it, during the five years. She was bound to give the notes, but was assured that the dividends would pay them. After she gave the notes, she had no occasion to look after them. She could rest upon the representations made to her. The defendant had the whole five years to make good the representations; and the first time she could expect to learn their falsity was when she went to demand the \$500. When she made such demand, and learned that her note had not been paid by the dividends, she asserted the fraud. It is impossible, therefore, to perceive upon what theory it can be said that she waived or lost any right to assert this fraud against the defendant.

She was therefore entitled to recover something in this action; and upon the facts disclosed, the measure of her recovery would be, at least, the cash paid by her upon the policy, with interest from the time of the payments.

The judgment must therefore be reversed, and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

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LAMBERT V. PEOPLE.

(76 N. Y. 220.)

Criminal law — perjury — disqualification of notary administering oath.

Perjury cannot be predicated of an affidavit sworn before a notary public professing to act in the city of New York, but who was a non-resident of the State at that time and at the time of his appointment.*

CONVICTION of perjury. The opinion states the point.

Abram Wakeman, for plaintiff in error.

Benj. K. Phelps, for defendant in error. The notary, before whom the affidavit was taken, was an officer *de jure*, and an offer to show that he was a non-resident at the time of his appointment could not be received. *Read v. City of Buffalo*, 3 Keyes, 447. The notary being an officer *de facto*, holding under appointment by authority, his acts were valid as to the public and all third persons, except in a proceeding to try his title to the office. *Wilcox v. Smith*, 5 Wend. 233; *People v. Collins*, 7 Johns. 549; *McInstry v. Tanner*, 9 id. 135; *Albertson's case*, 8 How. Pr. 363; *People v. White*, 24 Wend. 520; *People v. Stevens*, 5 Hill, 630; *Greenleaf v. Low*, 4 Den. 168; *People v. Hopson*, 1 id. 579; *Thompson v. State*, 21 Ala. 53; *State v. Carroll*, 38 Conn. 449; *People v. Cook*, 8 N. Y. 67; *State v. Hascall*, 6 N. H. 352; 2 C. & H. 1101; *Van Steenburgh v. Korts*, 10 Johns. 167; *Howard v. Sexton*, 1 Den. 440.

MILLER, J. [Omitting other points.]

Upon the trial, the counsel for the prisoner offered evidence for the purpose of showing that the notary, before whom the affidavit was taken, at the date of the same was, and for eighteen months previously had been a resident of the State of New Jersey, and that his family resided there. The affidavit bore date upon the 12th day of March, 1877, and the indictment averred that he was then a notary public of the city and county of New York, "having full, competent and lawful authority to administer the said oath."

* In *Case v. People*, 76 N. Y. 242, it was held that perjury could not be predicated of an affidavit where the affiant did not personally appear before the officer, and therefore the *jurat* might be contradicted by proof of that fact.

The testimony for the prosecution showed that the notary had an office in the city of New York, and that he had acted as notary for some years. It was also proved by the equity clerk of the Supreme Court, who produced a book from the county clerk's office, that it contained a list of the notaries and time of their appointment, qualification, etc.; and the date of the appointment of the notary who took the oath was stated to be upon the 10th of March, 1876, and also that his term would expire upon the 30th day of March, 1878. The testimony offered by the prisoner's counsel would establish that at the time when the notary was appointed, and ever since then, he was a resident of the State of New Jersey. According to the statutes of this State, no person is capable of holding a civil office who, at the time of his appointment, is not a citizen of the State. 1 R. S. 414, § 1. It was a material and important fact for the prosecution to establish, that the oath was legally administered (3 R. S. [6th ed.] 955, § 1), and the authority and jurisdiction of the officer before whom it was taken, which had been shown *prima facie* by the evidence referred to. The question presented is whether proof of the facts offered was admissible, for the purpose of showing that the person claiming to act as notary was not a legally appointed officer, and therefore his act was void and without jurisdiction. The effect of the testimony offered would have been to assail the authority of the officer who administered the oath. The rule is well settled that the acts of an officer *de facto* are valid, as respects the public and the rights of third persons, and it is not allowable to assail the title of such officer, in a collateral proceeding. *Read v. City of Buffalo*, 3 Keyes, 447; *McInstry v. Tanner*, 9 Johns. 134; *People v. Stevens*, 5 Hill, 616, 634; *Greenleaf v. Low*, 4 Den. 169; *People v. Hopson*, 1 id. 574, 579; *People v. Collins*, 7 Johns. 549; *People v. Cook*, 8 N. Y. 67.

In *People v. Cook*, *supra*, it is said in the opinion that: "A challenged voter, swearing falsely before a *de facto* board of inspectors, is as much liable to punishment under the statute as if the oath had been administered by inspectors *de jure*." While this may be a sound rule of law, it does not affect the question now considered, for the reason that the inspectors, in such a case, may be lawfully appointed or elected; and the failing to take the oath is, at most, an irregularity or defect, which cannot affect the legality of their election as inspectors, in the first instance. This is clearly distinguishable from a case where there is an entire want of power

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to make the appointment. The question here affects the origin of the appointment, and the right to hold the office, by virtue thereof, and is not merely an irregularity occasioned by a failure of the officer to take the oath required by law. There is a wide and marked distinction between the right to act at all and the failure to comply with some statutory requirement, in assuming power conferred by an appointment to discharge the duties of an official position. So also in *Howard v. Sexton*, 1 Den. 440, where it was held that parties to a submission to arbitration may waive the oath of the arbitrators, and that witnesses, whose oath is thus waived, may commit perjury, by false swearing upon such arbitration; the question as to the original authority and jurisdiction of the court, and its power to act, did not arise.

In none of the cases cited was the distinct question presented which we are now called upon to determine. Nor does either of them relate to any question arising upon an indictment for perjury, where jurisdiction is the essential feature; and the utmost extent to which any of the authorities cited have gone, in cases of perjury, is that proof that the officer acted as such is only *prima facie* evidence of his authority.

Conceding the correctness of the rule upheld in the cases cited, and that such rule is most generally applicable, I am of the opinion that it cannot be invoked where an indictment is found for perjury and the foundation of the charge rests entirely upon the competency or the jurisdiction of the officer or tribunal before which the oath is taken. This is one of the issues presented by the indictment, in this case; and upon principle, it would seem to be quite obvious that the accused party had a right to show that there was no such officer or tribunal in existence as is alleged in the indictment. Such a rule only operates in cases where a charge of perjury is preferred, while the acts of an officer *de facto*, acting under color of authority, even if he had been illegally appointed, under ordinary circumstances would not be affected or impaired. No pernicious consequences or serious inconvenience would result to the public at large by the enforcement of such a principle, as all acknowledgments made, or other acts of a notary public or of any other officer *de facto* done, while in the performance of his duties, except in cases where false swearing was directly charged, would be valid and lawful. The argument of *ab inconvenienti* therefore has no application, and should not influence the decision of the question considered,

even if it could properly be urged, to affect the disposition of a grave criminal charge, under any circumstances.

The principle stated is, we think, also upheld by sufficient authority. In *Rex v. Verelst*, 3 Camp. 432, an indictment was found for perjury committed before one acting as surrogate in the ecclesiastical court, in making oath to an answer in a cause there pending for a divorce. The surrogate having acted in that capacity, it was held that it was *prima facie* evidence of his appointment, and that he had authority to administer the oath. It appeared, however, from the registrar's book containing the appointment, that it was irregularly made, for the reason that instead of being authenticated in the usual manner, no notary public, nor the registrar, nor his deputy, had been present at the time, for the purpose of authenticating the act, according to the rule of the ancient common law; and it was claimed that the appointment was a nullity. In opposition to this view, it was contended by the prosecution that the officer appointed having acted for over twenty years in the capacity of surrogate, a judge and jury at *nisi prius* ought not to inquire into the manner of his appointment; and even if they did, they might presume that an officer was present, from the entry, and the appointment might be regular, although the entry was deficient. Lord ELLENBOROUGH held that the presumption arising from the acting as surrogate only stands until the contrary is proved; and after reviewing the facts, decided that the allegation that Dr. Parsons, who acted as surrogate, had authority to administer the oath, was negatived, and the defendant was acquitted.

There is a striking analogy between the case cited and the one at bar, for in both of them the question related to the validity of the appointment; and if it was illegal in the one case, the application of the same principle would render it equally so in the other. The case referred to is a *nisi prius* decision, but it has been cited in the elementary books approvingly, as well as in several reported cases in the courts.

In *Wilcox v. Smith*, 5 Wend. 231, 235, a constable was sued for trespass, and justified under an execution issued by a justice of the peace, which was regular upon its face; and it was held that showing that the officer issuing the process was an officer *de facto* is not merely *prima facie* evidence that he is an officer *de jure*, but was conclusive for the protection of a ministerial officer required to execute such process. In commenting upon the case of *Rex v.*

Verelst, supra, it is said in the opinion : " Here the act of the officer was made the foundation of an affirmative criminal proceeding, instead of being used as a defense or protection ; and it may well be that his strict legal title to his office, under such circumstances, may be inquired into (1 Hawk. P. C., ch. 69, § 4) ; but if an officer had been prosecuted as a trespasser for an act done under a precept or warrant issued by the surrogate, I apprehend an inquiry into the title of the surrogate to his office, after an unquestioned exercise of its powers for twenty years, would not have been permitted."

In 2 Hawkins' P. C. (7th London ed.) 86, it is laid down that : " It seemeth clear that no oath whatsoever, taken before a person acting merely in a private capacity or before those who take upon them to administer oaths of a public nature without legal authority for their so doing, or before those who are legally authorized to administer some kind of oaths, but not those which happen to be before them or even before those who take upon them to administer justice by virtue of an authority seemingly colorable, but in truth unwarranted and merely void, can ever amount to perjuries in the eye of the law, because they are of no manner of force, but are altogether idle." It is also said in the same section, by the same author, that " no false oath in an affidavit, made before persons falsely pretending to be authorized by a court of justice to take affidavits in relation to matters depending before such court, can properly be called perjury, because no affidavit is in any way regarded, unless it be made before persons legally intrusted with power to take it," etc.

In Archb. Cr. Pl. (7th G. & B. ed.) 537 and 538, it is stated, that the oath " must be taken before a competent jurisdiction. For if it appear to have been taken before a person who had no lawful authority to administer it (3 Inst. 165, 166) ; or who had no jurisdiction of the cause (3 Inst. 166; Yelv. 111), the defendant must be acquitted," and numerous authorities are cited to sustain this position. It follows, as a logical result of the authorities cited, that proof may be introduced for the purpose of showing a want of authority in the officer taking the oath.

In *Morrell v. The People*, 32 Ill. 499, an indictment was found for perjury before the clerk of the Circuit Court. One of the grounds of error alleged was that there was no proof that the person who administered the oath was clerk as alleged. It was held that it was requisite that it should be proved that the person, before whom the oath was taken, was authorized by law to administer it ;

that proof that the person who administered the oath habitually acted in the capacity of a particular officer is perhaps only *prima facie* evidence of the fact ; but until rebutted, it was sufficient, without producing his appointment or commission. This case, therefore, sustains the doctrine that the presumption from acting may be rebutted by proof to the contrary, citing *Rex v. Verelst, supra*, and other authorities. The principle stated is elementary, and I am unable to discover how it can be disregarded, without violating a well-established legal rule.

It is said that the notary was an officer *de jure*, and having been regularly appointed by the proper authority, who must be presumed to have passed upon the question of his residence, it is therefore *res adjudicata*. Conceding that as a general rule the governor may appoint an alien, or a convicted felon, or a minor, or other person, who is disqualified from holding a civil office, to an official position, and that inquiry cannot be made as to the title to the office collaterally, there is no reason why such a doctrine should prevail, where the jurisdiction of the officer, and his power to administer an oath, is a subject of controversy and dispute, and a contest is made on that point upon the trial on an indictment for perjury. As we have seen, the power, the authority and the right of the officer to administer the oath is the very foundation of the charge, and the basis upon which the offense rests, and hence is a matter which must be lawfully proved. Without testimony to establish this important fact, the indictment cannot be upheld, and the whole charge must fail ; and when such evidence is introduced, the right to contradict it is clear and unequivocal, and cannot be controverted by presumptions that the appointing power has performed its duty. The case of *Rex v. Verelst, supra*, which is fully sustained by other authorities, is directly in point on this question, and we think the doctrine there laid down is controlling.

In the conclusion at which I have arrived, in reference to the question last discussed, it is not intended to decide that where a public officer holds an office under a valid appointment or election, a subsequent disability can be made the subject of inquiry, in any other manner than by a direct proceeding for that purpose, or that his acts, as an officer *de facto*, are not valid until he is lawfully declared to be disqualified. Such a case has no analogy to one where there never was any power to act, and an entire want of authority from the commencement.

There is also another ground upon which I think that the evidence offered was admissible. The evidence introduced by the prosecution was very slight, and by no means conclusive. No commission was introduced to show Mellick's appointment, and only a single witness testified that he had been in the habit of acting for some years. The book introduced from the county clerk's office did not show that he had qualified by taking the oath of office; nor was such oath produced. No evidence of the genuineness of his signature in the book was given, nor was his handwriting distinctly proven. The evidence, at most, was *prima facie*; and to rebut the presumption arising from the same, and to show the improbability of his having been appointed to such an office, it was, I think, competent to prove that he was actually a non-resident, and was entirely disqualified from holding any such office. It was, at least, an open question as to the weight to be given to the testimony introduced by the prosecution, and the evidence offered should have been received as bearing upon that branch of the case.

There are numerous other questions in the error book of a serious character. As however the conviction was erroneous, upon the grounds stated, it is not important to consider them; and for the reasons already given, the conviction and judgment must be reversed and a new trial granted.

EARL, J. I concur in the result reached by Judge MILLER, and favor a reversal of the judgment upon three grounds:

1st. It was necessary for the People to show that the oath alleged to be false was taken before either a *de jure* or a *de facto* notary. The only proof given was that Mellick, who administered the oath, had acted as a notary for some years. This was *prima facie* evidence that he was a *de jure* notary. The defendant had the right to meet this *prima facie* case by any evidence tending to show that he was not *de jure* a notary, and the evidence offered to show that Mellick, at the time of his alleged appointment, and subsequently to the time he administered the oath, was a resident of New Jersey, had such tendency. If true, it would have shown that he was a person who could not have been legally appointed, and hence would have destroyed the presumption that he had actually been appointed. There could be no presumption that the governor appointed one to the office of notary whom he had no legal right to appoint. If this evidence had therefore been received and uncontradicted, it would have been

necessary then for the People to show that Mellick was a notary *de facto*. This could not have been shown by evidence that he had merely acted as such. The *de facto* character of officers is never established by simple proof that they have acted as such. In addition to such proof, it must be shown that they had color of office, or some semblance of competent authority. This is generally shown by proof of some election or appointment, formal, but irregular or defective, under which the officer has assumed to act. I am not, however, prepared to deny that an officer may have sufficient color, in some cases, without any appointment or election whatever; as when he takes possession of the public building or room where the duties are to be discharged, and has possession of the public property pertaining to the office, and is thus clothed with all the *indicia* of official position, and has for a considerable time, with the acquiescence of the public, and without dispute, openly and notoriously exercised the duties of the office. Such a case could rarely, if ever, occur in this country; but if it should occur, it might give color of office. To illustrate more clearly my meaning: if one should take possession of a county clerk's office, claiming to be clerk, and should there act as clerk for a considerable time, by the general acquiescence of the public, there being no one else to exercise the duties of the office, he might have sufficient color of office to make him clerk *de facto*. But a notary public having no public office, clothed with none of the symbols or outward tokens of official position, being one of thousands who may, anywhere in the same county, exercise the duties of the same office, cannot get color of office by simply acting from time to time as he might have opportunity. He can get color of office only by an appointment emanating from the appointing power, or from some power having, at least, a colorable right to make the appointment. If the governor should commission him, without confirmation by the senate, or while he was a non-resident, and he should then act, he would be in office under color of appointment, and thus become a notary *de facto*. These views are abundantly sustained by the authorities in this State. *People v. Collins*, 7 Johns. 549; *Wilcox v. Smith*, 5 Wend. 231; *Ring v. Grout*, 7 id. 341; *People v. White*, 24 id. 520; *Hamlin v. Dingman*, 5 Lans. 61; *People v. Cook*, 14 Barb. 259; a. c., 8 N. Y. 67. There was, therefore, error in the exclusion of the evidence as to the residence of the notary.

[Omitting other points.]

Lambert v. People.

HAND, J. I agree in the result of Judge MILLER's opinion, that there should be reversal of conviction and new trial in this case. I cannot, however, concur in all the grounds stated by him ; and as the fate of any new trial may be dependent upon some of them, it is proper that the views of the court should be expressed upon these questions.

[Omitting other points.]

3d. I also agree that the evidence as to the notary's residence was, under the circumstances, improperly excluded. I am not prepared to assent to the doctrine of the opinion that perjury can only be committed before an officer *de jure*, and that on the trial of an indictment for that crime, the title of such officer can always be attacked. Nor, indeed, am I prepared now to say, that if in the present case, the commission of the notary from the proper appointing power had been shown, the prisoner could have raised such a question as non-residence. I am inclined to think that in such a contingency, the question of residence being often a very nice one, the validity of the appointment could not thus be attacked. But here there was hardly any proof that the party who took the affidavit was a notary at all. The list in the clerk's office proved absolutely nothing ; and indeed, I do not see how it was admissible. The mere fact that he assumed to act as a notary was all the proof really given of his official position. It is doubtful, to my mind, whether this was any proof of even color of office. But if it be conceded that it tended in some degree to show a *de facto* officer, or to raise a presumption or inference that he had been appointed, I think proof that the person was a non-resident, and therefore incapable of holding that position, was admissible, to rebut any such presumption *that he had ever been appointed*, and was any thing but a mere intruder. Of course, if legal proof, of any sort, of an appointment had been made, there would be no longer any room for presumption upon this point, and nothing of that sort which could be rebutted ; but not so, as the case now stands.

CHURCH, C. J., concurs with MILLER, J., as to rejection of evidence of non-residence of notary. FOLGER, J., concurs with HAND, J., as to notary. RAPALLO, J., concurs with EARL, J., as to notary.

Judgment reversed.

PEOPLE V. CRAPO.

(76 N. Y. 268.)

Criminal law — evidence — impeachment of prisoner.

On a trial for burglary it is incompetent to ask the prisoner on cross-examination if he had not been arrested for bigamy, as such evidence does not legitimately tend to impair his credibility.*

CONVICTION of burglary reversed at General Term. The opinion states the facts.

Watson M. Rogers, district attorney, for plaintiff in error. The question to the prisoner, on cross-examination, whether he had ever been arrested on a charge of bigamy was admissible. *La Beau v. People*, 34 N. Y. 233, 234; *Turnpike v. Loomis*, 32 id. 127; *Brandon v. People*, 42 id. 265; *Real v. People*, id. 281; *Ruloff v. People*, 45 id. 221; *Connors v. People*, 50 id. 240, 242; *Southworth v. Bennett*, 58 id. 659; *Maine v. People*, 9 Hun, 113.

Bradley Winslow, for defendant in error.

CHURCH, C. J. The defendant in error was convicted at a Court of Sessions in Jefferson county, of burglary and larceny for breaking into an outbuilding, and stealing therefrom about six bushels of wheat. The General Term reversed the conviction for an error in rejecting evidence offered by the prisoner, and an error in allowing evidence, against the prisoner's objection. The proof on the part of the prosecution was mainly circumstantial. A material circumstance relied upon was that a small quantity of wheat of the species of that stolen was found in the pocket of the prisoner by a police officer who searched him on suspicion that he was concerned in the commission of another offense about the time the wheat in question was supposed to have been stolen, and the police officer testified that the prisoner said it was a sample "fetched up to sell by," and that he had sold some wheat to Shead & Graves, millers at Watertown. One of that firm testified that he purchased about six bushels of wheat of some man, but did not identify the prisoner as the person of whom he purchased.

* See note, 27 Am. Rep. 140.

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The prisoner offered to prove by his own evidence, and that of his mother, that about that time he had taken and sold wheat at another place, which was rejected by the court, and an exception taken. The district attorney asked the prisoner on cross-examination as a witness, "Were you also in 1869, along in February or March, arrested on a charge of bigamy?" This was objected to by the counsel for the prisoner. The objection was overruled, and an exception taken. These decisions were held to be erroneous by the General Term.

We concur with the judgment of the General Term, and with the reasons therefor, stated in the opinion of TALCOTT, J., and it is unnecessary to elaborate them.

[Omitting the other point.]

In respect to the other question the ruling was clearly erroneous. Although the prisoner did not claim the privilege, the question was incompetent. It did not legitimately tend to impair the credibility of the prisoner as a witness, and was not competent for any purpose. The discretion which courts possess, to permit questions of particular acts to be put to witnesses for the purpose of impairing credibility, should be exercised with great caution, when an accused person is a witness on his own trial. He goes upon the stand under a cloud; he stands charged with a criminal offense, not only, but is under the strongest possible temptation to give evidence favorable to himself. His evidence is therefore looked upon with suspicion and distrust, and if in addition to this he may be subjected to a cross-examination upon every incident of his life, and every charge of vice or crime which may have been made against him, and which have no bearing upon the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict, upon evidence which otherwise would be deemed insufficient. It is not legitimate to bolster up a weak case by probabilities based upon other transactions. An accused person is required to meet the specific charge made against him, and is not called upon to defend himself against every act of his life. Neither in *People v. Brandon*, 42 N. Y. 265, nor in the *People v. Connors*, 50 id. 240, was the point of relevancy upon the question of credibility presented. In each case, the ground of objection was specific, and did not involve that point. *People v. Brown*, not reported.

Mr. Greenleaf, in his work on Evidence, lays down the rule that questions, the answers to which, though they may disgrace the

witness in other respects, yet will not affect the credit due to his testimony, are clearly impertinent and not allowable; and even as to questions which do tend to discredit him as a witness, although sometimes allowed at *nisi prius*, he regards the rule as unsettled. He says: "The great question, however, whether a witness may not be bound in some cases to answer an interrogatory to his own moral degradation, when, though it is collateral to the main issue, it is relevant to his character for veracity, has not yet been brought into direct and solemn judgment, and must therefore be regarded as an open question, notwithstanding the practice of eminent judges at *nisi prius* in favor of the inquiry under the limitations we have above stated." To allow them at all was a departure from the old rule. Lord ELDON said: "It used to be said that a witness could not be called on to discredit himself, but there seems to be something like a departure from that. I mean that in modern times, the courts have permitted questions, to show from transactions not in issue, that the witness is of impeached character and therefore not so credible." *Parkhurst v. Lowten*, 2 Swanst. 216.

Mr. Phillips, in his work on Evidence, gives the reasons for and against allowing questions collateral to the issue, when they affect credibility. The reasons in favor are that without allowing them there would be no adequate means of ascertaining what credit is due to the testimony of a witness, and that it is especially necessary in the case of spies, informers, and accomplices, in order to prevent property, or even life from being endangered by the unexpected appearance of a strange witness. 2 Phil. on Ev. *943 (5th Am. ed.).

This reasoning has no application to the case of an accused person who appears as a witness. The prosecution can never be taken by surprise, either as to his being a witness, or his character. The reasoning against this kind of evidence is far more logical, and satisfactory. Mr. Phillips states it substantially as follows: That the obligation of an oath only binds to speak touching the matters in issue; that such particular matters, as whether the party has been in jail for felony, or suffered infamous punishment or the like, is not a part of the issue, because other witnesses could not be called to prove them; that it would be an extreme grievance to a witness to be compelled to disclose past transactions of his life, which may have been since forgotten, and to expose his character afresh to evil report; that if a witness is privileged from answering a question which is relevant to the issue because it may tend to the

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forfeiture of property, with much more reason ought he to be excused from answering an irrelevant question, to the disparagement and forfeiture of his character; that in the case of accomplices an exception to a certain extent might be made on account of their peculiar situation, etc. *Id.*

While the practice has obtained to some extent of allowing questions to a witness, the answers to which would tend to impeach his credibility, the courts have uniformly excluded questions which do not clearly have that effect. In *People v. Genung*, 11 Wend. 19, the question put to the prosecutor whether he had not frequently during the session of the court offered to the prisoner that if he would settle the subject-matter of the indictment, he would leave the court and not appear as a witness, was held incompetent because it did not impair credibility. In *People v. Gay*, 7 N. Y. 378, JEWETT, J., said: "The single fact that he (the witness) had been complained of and held for trial for the commission of a crime, did not affect his moral character." This was upon the ground that the witness was presumed innocent until convicted. No rule of law is violated in requiring that to entitle questions to be put to accused persons, which are irrelevant to the issue, and are calculated to prejudice him with the jury, they should at least be of a character which clearly go to impeach his general moral character, and his credibility as a witness. The old rule, not to allow irrelevant questions to such persons, would be preferable and more in accordance with sound principles of justice; but it is unnecessary in this case to go beyond the requirement that the answer must tend directly to impeach him. It is not necessary to examine the other points.

The order of the General Term should be affirmed.

All concur, except FOLGER and EARL, JJ.

Order affirmed.

CLARK V. BARNES.

(76 N. Y. 301.)

Constitutional law — agricultural leases — evasion.

The constitutional prohibition of agricultural leases for a longer period than twelve years cannot be evaded by the executing of two leases at the same time and for the same consideration, one for eight, and the other for twelve years, the latter to commence at the expiration of the first term; but both are void; and a former lease, surrendered in consideration of the execution of these, is not reinstated.*

SUMMARY proceedings to remove a tenant. The opinion states the facts. The plaintiff had judgment below, reversed at Special and General Terms.

E. L. Stevens, for appellant.

Johnson & Prescott, for respondents. The twelve year lease was valid as a covenant or contract between the parties, during the eight years, for a leasing to begin at the expiration of each term. *Whitney v. Allaire*, 1 N. Y. 305; *Hart v. Hart*, 22 Barb. 606; *Fruhl v. Granger*, 8 N. Y. 115; *Iggulden v. May*, 9 Ves. 325; *Watson v. Hospital*, 14 id. 332; *Willan v. Willan*, 16 id. 84; *Taylor v. Stibbert*, 2 id. 443, note 4; 5 Bac. Abr. 677; (Bouv. ed.); *Stephens v. Reynolds*, 6 N. Y. 454; *Parsell v. Stryker*, 41 id. 480; *Willard's Eq.* 284; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279; *Pierce v. Nichols*, 1 Pai. 244. If the consideration for the surrender of the life lease was void, then the surrender is a nullity. *Dyett v. Pendleton*, 8 Cow. 727, 733. If the stipulation for the surrender of the life lease and the two leases are to be construed as one contract, the general apparent purpose of the whole transaction will determine the purpose of the parties. 2 Pars. on Cont. 15; *Lynde v. Budd*, 2 Pai. 191; *Howes v. Woodruff*, 21 Wend. 641; *Hull v. Adams*, 1 Hill, 601; *Cornell v. Todd*, 2 Den. 130; *Draper v. Snow*, 20 N. Y. 331; *Rogers v. Smith*, 47 id. 327; *Jackson v. McKenney*, 3 Wend. 233; *Stow v. Tift*, 15 John. 458; *Hunt v. Livermore*, 5 Pick. 395; *Jackson v. Dunsbaghs*, 1 John. Cas. 429; *Ford v. Belmont*, 7 Robt. 97; s. c., 508. The constitutional prohibition being in derogation of personal right, should be

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liberally and equitably construed. *People v. Supervisors Chenango*, 8 N. Y. 328 ; *People v. Supervisors Orange*, 27 Barb. 575 ; *People v. Supervisors Orange*, 17 N. Y. 241 ; Smith's Com. of Stat. Con. §15 ; *Sherwood v. Reade*, 7 Hill, 431 ; *Sharp v. Speir*, 4 id. 76 ; *Morse v. Williamson*, 35 Barb. 472. Plaintiff having accepted full performance will not be permitted to withhold fulfillment. *Wilard's Eq.* 284 ; *Pierce v. Nichols*, 1 Pai. 244 ; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279 ; *Stephens v. Reynolds*, 6 N. Y. 456-457.

EARL, J. In February, 1865, the defendants were in possession of a certain farm, situated in Oneida county, under a lease for three lives, given in 1841. The farm belonged to the plaintiff, subject to this lease, which was held by the defendant Barnes, and which had not yet by its terms come to an end. At that time an action was pending, in favor of the plaintiff, against Barnes, for what purpose does not definitely appear, but probably to recover possession of the farm ; and the action was upon the calendar of the Circuit Court for trial. The parties then entered into a written agreement for the settlement of the suit, whereby Barnes was to cancel, surrender and deliver the lease to Clark, and to pay arrearages of rent, and Clark was to execute two leases of the same farm to Barnes, one for eight years from February 1, 1865, and another, in the same form, for twelve years from February 1, 1873 ; and on the full performance of these stipulations, the action was to be discontinued, without costs to either party. In pursuance of this, Barnes paid the rent, and cancelled and surrendered the lease, by an instrument under seal, and Clark executed the two leases for the terms mentioned.

Barnes occupied, and paid the rent, under the first lease, until after February, 1873 ; and in July of that year, after making proper demands upon the defendants for the possession of the premises, Clark commenced this proceeding to recover the possession, upon the claim that the lease for twelve years was void, under the Constitution of this State.

It is provided in section 14 of article 1 of the Constitution that "no lease or grant of agricultural land, for a longer period than twelve years, hereafter made, in which shall be reserved any rent or services of any kind, shall be valid. This provision condemns all leases for a longer period than twelve years. A lease for a longer period than that would not be valid for twelve years, but the lease

itself would be void *in toto*. It is not provided that no lease shall be valid for a longer term than twelve years; but the provision is that the kind of lease described shall be invalid. Hence, if this had been one lease for twenty years, it would unquestionably have been void. But the claim is that, as neither of these leases is for a longer period than twelve years, the Constitution has not been violated. But both leases were executed, in pursuance of a written agreement, at the same time, upon the same consideration, as parts of the same transaction, and were upon precisely the same terms; and they may, therefore, be construed together, as if they were contained in the same instrument. If the leasing had been by one instrument, for these two terms, it would not be disputed that, within the meaning of the Constitution, there would have been a lease for twenty years; and the effect is the same, and the construction must be the same, under the circumstances disclosed here, although the agreement is witnessed by two instruments instead of one. Otherwise the whole policy of the constitutional provision could be defeated, by cutting a very long term up into successive short terms, by the use of separate instruments, all executed at the same time. It is apparent that there was the purpose to evade this constitutional provision; and if necessary, we must infer that the jury so found.

But the further claim is made that, if these leases were void, then the prior lease for three lives, which had not expired, was reinstated. But this does not follow. That lease had been cancelled and surrendered. The two leases executed at the time were not the sole consideration for such cancellation and surrender. The suit was discontinued, without costs; and how valuable that consideration was to the defendant, and how detrimental to the plaintiff, we do not know. The only way Barnes can have the old lease reinstated is by a suit in equity for that purpose; and in such suit he may probably have relief, if he can show that he was induced to give up his original lease by fraud or mistake, or that the consideration for the surrender has substantially failed; and all the rights of both parties can be adjusted and protected.

The judgment of the General Term and the Special Term must be reversed, and the judgment of the justice must be affirmed with costs.

All concur except CHURCH, C. J., and MILLER, J., dissenting.

Judgment accordingly.

RODERIGAS V. EAST RIVER SAVINGS INSTITUTION.

(76 N. Y. 316.)

Jurisdiction — administration on estate of living persons.

Where a petition for letters of administration was presented to the clerk of the surrogate, in the surrogate's absence, and the clerk filled up a blank appointment signed and left with him by the surrogate, without evidence outside the petition of the death of the alleged decedent, the surrogate having no knowledge of and never acting upon the petition, the letters are void, and do not protect a debtor who in good faith pays his debt to the administrator named therein.

ACTION to recover bank deposit. The opinion states the facts. The defendant had judgment at the trial, which was reversed at General Term.

S. P. Nash, for appellant. Evidence that the surrogate did not, in person, pass upon the application for letters should have been excluded. *Savacool v. Boughton*, 5 Wend. 170; *Stanton v. Schell*, 3 Sandf. 323; *Chegaray v. Jenkins*, 1 Seld. 376. The letters were conclusive as to the defendant. *Roderigas v. E. R. Sav. Inst.*, 63 N. Y. 469, 471; 1 Phil. Ev. 380; 2 C. & H., note, Phil. Ev. 990, 1008, 1009; *Gwinne v. Poole*, 2 Lutw. 1568; *Savacool v. Boughton*, 5 Wend. 170; *Chegaray v. Jenkins*, 1 Seld. 378; *Bradley v. Ward*, 58 N. Y. 401. When an officer is called upon to execute process valid on its face, or a third person to submit to the mandates or injunctions of persons clothed with apparent official authority, the process, official mandate, etc., protects the action if it is *bona fide*. *Savacool v. Boughton*, 5 Wend. 170; *McGuinty v. Herrick*, id. 240; *Wilcox v. Smith*, id. 231; *Horton v. Hendershot*, 1 Hill, 118, 119; *Earl v. Camp*, 16 Wend. 562; *Griffith v. Frasier*, 8 Cr. 9. The doctrine of protection to persons dealing with officers *de facto* is analogous to that of protection to officers acting under process. *Wilcox v. Smith*, 5 Wend. 231; *McKinstry v. Tanner*, 9 Johns. 135; *Allen v. Dundas*, 3 T. R. 125; *Fowler v. Beebe*, 9 Mass. 231; 6 Am. Dec. 62; *Coolidge v. Brigham*, 1 Allen, 333; *Fitchbury Co. v. G. J. Co.*, id. 552. The acts of the administrator were valid as those of an officer *de facto*. *State v. Carroll*, 38 Conn. 449; s. c., 9 Am. Rep. 409; *Parker v. Baker*, 8 Pa. 428; *Cocks v. Halsey*, 16 Pet. 71.

Roderigas v. East River Savings Institution.

Samuel Jones, for respondent.

CHURCH, C. J. In another action brought by the same plaintiff as administratrix of her husband's estate against this same defendant, this court held that the payment by the defendant to Isabella McNeil, who had been appointed administratrix of the estate of the husband, was a bar to the action although it appeared that at the time the letters were issued, he was alive. *Roderigas v. E. R. Sav. Inst.*, 63 N. Y. 460 ; s. c., 20 Am. Rep. 555. In this case the defendant sets up in bar the payment of the moneys claimed by the plaintiff, to Mrs. McNeil, who presented similar letters, purporting to have been issued by the surrogate of New York, upon the estate of the plaintiff. The only difference in the facts between the two cases is that in this it was proved and is found by the trial judge, that the petition of Mrs. McNeil was not presented to the surrogate, and that he never saw her, and never in fact acted upon the petition, and had no actual knowledge of it, nor of the issuing of the letters, that the business was done by a clerk in the office, who used a blank which had been signed by the surrogate and left with him, and attached the surrogate's seal.

Another distinction is that in this case the contents of the petition are found, by which it appears that the petitioner Mrs. McNeil alleged the death upon the best of her knowledge, information, and belief, without other proof. The ground of the decision in the other case was that by the statute (2 R. S. 74, §§ 23, 26), the surrogate had power to determine the fact of death upon the evidence presented, that such inquiry was judicial in its nature, and that letters issued by him upon due proof, were conclusive authority to the administrator, so far as to protect third persons in making payments to the administrator acting upon the faith of them, and that the letters as against such persons could not be attacked collaterally.

It is now insisted that the surrogate never having in fact exercised any judicial function in respect to the matter, nor in any manner passed upon the question, the basis of the former decision is removed, and the letters should be regarded as utterly void. In view of the former decision, the question now presented is a very embarrassing one. That decision was concurred in by a majority of the court, and we do not feel justified in reviewing it upon the merits.

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At common law the authorities are uniform that the jurisdiction of surrogates is confined to granting administration upon the estates of deceased persons, and that if a person is alive the letters are an absolute nullity. *Jochumsen v. Suffolk Bank*, 3 Allen, 87; *Allen v. Dundas*, 3 T. R. 125; *Griffith v. Frazier*, 8 Cranch, 9; *Melia v. Simons*, 45 Wis. 334; s. c., 30 Am. Rep. 746.

In the former case the jurisdiction was held to be saved by force of our statute requiring a judicial determination by the surrogate of the fact of death. When it appears that such determination was not had, it is difficult to find any ground for upholding the validity of the letters for any purpose, even for the protection of innocent persons. There is no branch of the law more difficult of solution than to define when and under what circumstances the proceedings of inferior as well as superior courts may be attacked, and when they are a protection to persons acting under them. They may be held valid when the question is presented in one form, and invalid in another, and they may protect some persons and not others. The books are full of decisions, some of which are conflicting, recognizing distinctions and refinements which render the subject intricate and perplexing to deal with. I have examined the numerous authorities cited by the learned counsel engaged in this case and many others, and they are somewhat calculated to impress one with the uncertainty of the law. The apparent conflict, however, arises more from the difficulty of applying principles in particular cases, than in principles themselves. I have neither the time nor inclination to review the authorities, nor do I think it profitable to do so. There are some general rules that are well settled. One is that the proceedings of courts, especially of limited jurisdiction, may be attacked collaterally for want of jurisdiction over the subject-matter. Another is that if the court or officer has jurisdiction of the subject-matter, then the exercise of that jurisdiction, however irregular or erroneous, is conclusive until reversed. Surrogates' courts have a stinted jurisdiction, but their decrees and orders are protected, when acting within their jurisdiction. If the surrogate has jurisdiction of the general subject-matter, and may exercise that jurisdiction in a variety of cases depending upon residence and the like, his decision after a hearing of the parties upon the question, whether the case calling for the exercise of jurisdiction exists or not, is protected from collateral attack. In other words it is enough if he has general jurisdiction of the subject-

matter. This general rule is sustained by the current of authority, but within this rule are many distinctions and qualifications. An elaborate review of the authorities will be found in 2 Cowen & Hill's Notes, 987.

An important point to determine in this case is, what is the general subject-matter of which the surrogate has jurisdiction? Is it to grant administration upon estates? Clearly not, but only to grant administration upon the estates of deceased persons. There is no authority conferred under any possible circumstances to grant administration when a person is living. But if a person be actually dead then the surrogate is vested with power over the general subject-matter. In the latter case he has a right to act, and although he acts erroneously his action cannot be impeached collaterally. He may commit an error as to inhabitancy, which would be sufficient to reverse his decision, but not sufficient to render it void from the beginning for the reason that he had power to act upon the subject. This principle is illustrated in *Allen v. Dundas*, 3 T. R. 60, where it was held that payment to an executor of a forged will was a good discharge, and this was put upon the ground that the court had jurisdiction over the subject-matter, and having judicially determined the validity of the will it was good until reversed, and the distinction above referred to is recognized. ASHHURST, J., said: "The case of a probate of a supposed will during the life of the party may be distinguished from the present, because during his life the Ecclesiastical Court has no jurisdiction, nor can they inquire who is his representative, but when the party is dead, it is within their jurisdiction." And BULLER, J., said: "Then this case was compared to a probate of a supposed will of a living person, but in such a case the Ecclesiastical Court have no jurisdiction, and the probate can have no effect. Their jurisdiction is only to grant probates of the wills of dead persons."

In *Griffith v. Frazier*, 8 Cr. 9, the same distinction is laid down by MARSHALL, C. J., between an erroneous act or judgment by a tribunal having cognizance of the subject-matter, and an act of a tribunal not having such cognizance. He says: "But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. Yet the decision of the ordinary that the person on whose estate he acts is dead,

if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case in truth was not one within his jurisdiction." By the former decision of this court, the statute was construed to extend the jurisdiction of surrogates to issue letters, so that not only may letters be issued upon the estates of dead persons, but also upon estates of persons who the surrogate should judicially determine upon evidence were deceased. If this is the proper construction of the statute, the decision was right within the rule referred to, and the letters issued by him would be conclusive, although he may have decided upon false testimony, or may have erred in judgment. But the question here is different. It is not sought to impeach the judgment of the surrogate, but to show that he never exercised his judgment, that he never acted. It may be shown that the seal of the surrogate has been forged, for that does not impeach his judgment. 1 Williams on Ex'rs, 489, and cases cited. It might be shown for the same reason that a blank signed and sealed had been stolen, and filled up by a third person. And I apprehend that any jurisdictional vice which does not impeach the decision of the surrogate may be shown to avoid the force of the letters. In this case while the act of the clerk in issuing the letters may not have been criminal, it was unauthorized. His act was not the act of the surrogate. Judicial powers cannot be delegated. *Powell v. Tuttle*, 3 Comst. 396; *Keeler v. Frost*, 22 Barb. 400. To sustain this defense the letters must be held conclusive, either that the plaintiff was dead, or that the surrogate had so determined. Neither was true in fact, and the letters are left without any jurisdiction to stand upon. A mere defective exercise of power would present a different question. Here no power or judgment was exercised at all.

There is still another difficulty in maintaining this defense, and that is that there was nothing amounting to proof that the plaintiff was dead. The basis of our former decision was that the statute authorized the surrogate to decide upon evidence. Mere information and belief, without any reasons for it, is not proof or evidence in any legal sense. It is quite unnecessary in this case, and it is not intended to hold that the fact that the surrogate did not act, and the defective proof would avail if the plaintiff had been dead, because then the surrogate would have had jurisdiction over the subject-matter, and subsequent irregularities and defects would not vitiate the proceedings, so as to render them void. So to

speak, here was an accumulation of weakness. The plaintiff was alive; the surrogate never decided that she was dead, and the clerk even who issued the letters had no evidence that she was dead. I think that there was too much "voidness" in this proceeding to justify any court in sustaining it, for any purpose whatever.

We have been referred to no authority holding that letters of administration, although apparently genuine, are conclusive against collateral attack, upon all these points of jurisdiction. The learned counsel for the defendant invoked the rule of protection to ministerial officers, in respect to which *Savacool v. Boughton*, 5 Wend. 170, is a leading authority in this State. That rule has no application. It applies to ministerial officers who having process apparently regular are bound to act, and are hence protected in acting. The rule goes no further. It does not protect the party nor a purchaser under such a process, however innocent he may be.

It is argued more plausibly that Mrs. McNeil should be regarded as a *de facto* administratrix. There would be force in this suggestion as to any defect short of an utter want of jurisdiction. She relies for color of authority upon the judgment of the surrogate in a case where he had no jurisdiction, and where he never acted. The case of *Allen v. Dundas*, *supra*, illustrates a *de facto* executor, and holds that the principle does not apply when there is a want of jurisdiction. The application of the *de facto* principle is not the same, as in the case of public officers. Executors and administrators are not public officers, and the rule of protection to those dealing with them is more restricted than when applied to public officers. Other principles intervene in respect to the validity of judicial proceedings, which limit somewhat the application of the principle as applied to the acts of public officers. If the plaintiff had been dead, or perhaps under the former decision if the surrogate had upon evidence decided that she was dead, I am inclined to think that Mrs. McNeil would have been a *de facto* administratrix, and the defendant would have been protected, but in this case both of these jurisdictional facts are wanting.

We are not insensible to the appeal of the learned counsel upon the propriety of protecting innocent persons in dealing with administrators acting under an apparent legal authority, and in our former decision, we evinced our appreciation of this consideration by going to the very verge of judicial precedent for the purpose of sustaining it, but we do not feel justified in going further. The

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defendant is not the only innocent party in this transaction. The plaintiff is equally innocent. She has had her property taken from her without her consent, and without authority of law, and is entitled at least to a measure of protection.

I am of opinion that the order of the General Term must be affirmed, and judgment absolute given for the plaintiff.

All concur, MILLER, J., concurring in result.

Order affirmed.

CUSHMAN V. THAYER MANUFACTURING JEWELRY COMPANY.

(78 N. Y. 365.)

Corporation — transfer of stock — action to compel.

Cushman transferred to his wife, the plaintiff, as a gift, certain shares of stock of the defendant corporation, by assignment on the back of the certificate, which assignment was witnessed by Beals, an officer of the defendant, and accompanied by a power of attorney authorizing the plaintiff to act for the assignor; subsequently Cushman assigned the same stock to Beals, for a trifling consideration, without the certificate, and Beals, with knowledge of the plaintiff's claim, transferred the stock to himself on the books of the company; the stock was not transferable except on surrender of the certificate; the plaintiff, producing the certificate and power of attorney, demanded from the defendant a transfer of the stock to herself, which was refused, and she brought this suit to compel the transfer. *Held*, that she was entitled to such relief, and was not restricted to an action for damages.

ACTION to compel defendant to transfer stock and issue a new certificate.

The original certificate of the stock was issued to Peter B. Cushman, plaintiff's husband; and by its terms the stock was transferable only upon the books of the company upon surrender of the certificate. On January 26, 1875, Cushman executed in blank the usual assignment and power of attorney printed upon the back of the certificate, witnessed by Beals, an officer of defendant, and delivered the same to plaintiff, who presented it to defendant, offered to surrender it, and demanded a transfer of the stock to her upon the company's books, and that a certificate be issued to her; the defendant refused. The blanks in the assignment were filled before such presentation by inserting the name of plaintiff as assignee, and the name of Thayer as attorney. After the assignment to plaintiff,

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Cushman executed an assignment of the stock to Beals for a valuable consideration, and caused the same to be transferred to Beals upon defendant's books.

Other facts appear in the opinion. The plaintiff had judgment below.

Robert Sewell, for appellant. There was no case for equitable relief. *Atty.-Genl. v. Utica Ins. Co.*, 2 Johns. Ch. 376; *King v. Whitwell*, 5 T. R. 85; 2 Kent's Com. (12th ed.) 314; Const., art. 1, § 2. Plaintiff's remedy, if any, was an action for damages. *Rea v. Bk. England*, Doug. 524; *Danforth v. Schoharie Co.*, 12 Johns. 227; *Helm v. Swiggett*, 12 Ind. 194; *Shipley v. Meck. Bk.*, 10 Johns. 484; *Gray v. Portland Bk.*, 3 Mass. 364; 3 Am. Dec. 150; *Sargent v. Franklin Co.*, 8 Pick. 90; *Bates v. N.Y. Co.*, 3 Johns. Cas. 538; *Com. Bk. v. Kortright*, 22 Wend. 348; *Pollock v. Nat. Bk.*, 7 N. Y. 274; *Smith v. Coal Co.*, 7 Lans. 317; *Stebbins v. P. Ins. Co.*, 3 Pai. 350; Ang. & Ames on Corp. 352; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Bk. of U. v. Smalley*, 2 Conn. 770; *Gilbert v. Man. I. Man. Co.*, 11 Wend. 627.

Richard C. Elliott, for respondent.

MILLER, J. The right of the plaintiff to maintain this action depends upon the question whether an equitable action will lie to compel a transfer of stock by a corporation to the owner of the same, or the plaintiff must seek a remedy by an action at law for damages. The latter action is frequently of no avail, and does not always afford complete and full redress. It is easy to see that a party may have become the owner or purchaser of stock in a corporation, which he desires to hold as a permanent investment, which may be at the time of but little value, in fact without any market value whatever, and its real worth may consist in the prospective rise which the owner has reason to anticipate will follow from facts within his knowledge. To say that the holder shall not be entitled to the stock, because the corporation, without any just reason, refuses to transfer it, and that he shall be left to pursue the remedy of an action for damages, in which he can recover only a nominal amount, would establish a rule which must work great injustice in many cases, and confer a power on corporate bodies which has no sanction in the law. A court of equity will enforce a specific performance on a contract for the sale of real estate, and compel

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the execution of a deed by the vendor to the vendee, although an action at law may be brought to recover damages for the breach of the contract. Such a case bears a striking analogy to the one now presented, and the same principle is manifestly applicable where the remedy at law is inadequate to furnish the proper relief.

That an equitable action will lie, in such a case, has been distinctly recognized in a number of the adjudicated cases in this State. In *Middlebrook v. Merchants' Bank*, 41 Barb. 481; 27 How. 474, the action was brought to compel the bank to allow the transfer of certain shares of bank stock to the plaintiff. A decree was made directing the transfer, and upon appeal to the Court of Appeals, the judgment of the Supreme Court was affirmed. 3 Abb. App. Dec. 295. No question was raised in either of the courts as to the right to maintain the action; and it is said, in the opinion of the Court of Appeals: "His" (the plaintiff's) "right was perfect and his demand wrongfully refused." As no point was made that the action did not lie, it is fair to assume that it was conceded that it could be maintained. In *Com. Bk. of Buffalo v. Kortright*, 22 Wend. 348, it was held that an action of assumpsit lies against a corporation for damages for refusing to permit a transfer of stock on its books. The chancellor, who dissented from a majority of the court, in his opinion says that the plaintiff might still file a bill to have a sale of the pledge and to compel the bank to allow a transfer of the stock to the purchaser. The decision of the case did not turn on the question now considered; and hence the point was not decided, and the remarks of the chancellor are only entitled to weight as the opinion of a judge learned and distinguished in this department of the law. In *Pollock v. National Bank*, 3 Seld. 274, it was held that a bank which has permitted a transfer of stock owned by a stockholder, upon a forged power of attorney, and has cancelled the original certificates, may be compelled to issue new certificates; and if it has no shares which it can so issue, to pay the value thereof. If in such a case new certificates may be decreed to be issued, surely it should be done where the right of the owner is entirely clear. The action was of an equitable character, and the principle decided recognizes the right to compel a transfer of stock by the bank. In *Purchase v. N. Y. Ex. Bk.*, 3 Robt. 164, it was held that after an assignment of bank stock, the bank, upon the application of the owner, is bound to allow the transfer to be made on its books, and to issue a new certificate, unless restrained

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by the order of a court of competent jurisdiction. In *White v. Schuyler*, 1 Abb. Pr. (N. S.) 300, it was held that specific performance of an agreement to transfer stock may be decreed, where the contract to convey is clear, and the uncertain value of the stock renders it difficult to do justice by an award of damages. The specific objection that the party had a remedy at law was not taken, although the point was in the case. The question was considered in the opinion by HOGEBROOM, J., and numerous authorities are cited to sustain the principle laid down. The same rule is held in the case of *Buckmaster v. Consumers' Ice Co.*, 5 Daly, 313. These cases show a recognition of the principle that a court of equity will interfere when the remedy is defective at law, if such an interference be not against equity and good conscience. See *Seymour v. Delancey*, 6 Johns. Ch. 222; 3 Cow. 445.

While the general rule is for courts of equity not to entertain jurisdiction for a specific performance on the sale of stock, this rule is limited to cases where a compensation in damages would furnish a complete and satisfactory remedy. *Phillips v. Berger*, 2 Barb. 608; Story's Eq. Jur., § 717. Judge STORY, in section 717, states as the reason why a contract for stock is not specifically decreed, that "it is ordinarily capable of such an exact compensation." He further says: "But cases of a peculiar stock may easily be supposed, where courts of equity might still feel themselves bound to decree a specific performance, upon the ground, that from its nature, it has a peculiar value, and is incapable of compensation by damages." He also says, in regard to the general rule as to jurisdiction, in section 718: "The rule is a qualified one, and subject to exceptions; or rather, the rule is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy." The case considered comes directly within the exception stated. A recovery of damages would furnish inadequate compensation; the remedy by mandamus cannot be invoked as the authorities hold, and there can be no question that in a case of this kind a court of equity alone can grant the proper relief.

It is insisted that when the plaintiff demanded a transfer on the books of the company, the stock had already been transferred to another person, who had paid a money consideration to the plaintiff's husband, from whom she claimed, and the remedy, if any, was by an action for damages. We think that the transfer alleged, under the circumstances, was not a valid one as against the plaintiff,

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and furnishes no sufficient answer to the plaintiff's claim, if, as we have seen, she had a right to maintain an action in equity to compel a transfer of the stock to her. Her right was paramount to that which the defendant seeks to interpose as a defense. The stock had previously, and on the 19th of January, 1875, been transferred to her by an assignment indorsed on the back of the certificate, and on the same day a power of attorney had been executed by the owner to her, which authorized the plaintiff to act for him and in his behalf. That the transfer was made without a moneyed consideration can make no difference, as it was otherwise valid. The assignments to Beals, which, it is claimed, are entitled to priority, bore date some time after the transfer to the plaintiff. As they were subsequent to such transfer, and as by the certificate the stock was only transferable upon the books of the company upon a surrender of the same, no title could pass, unless the transfer was thus made. The delivery of the certificate, as between the owner and assignee, with the assignment and power indorsed, passes the entire legal and equitable title in the stock, subject only to such liens or claims as the corporation may have upon it. *McNeil v. Tenth Nat. Bk.*, 46 N. Y. 331; s. c., 7 Am. Rep. 341; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30, 80. Any act suffered by the corporation, that invested a third party with the ownership of the shares, without due production and surrender of the certificate, rendered it liable to the owner; and it was its duty to resist any transfer on the books without such production and surrender. *Smith v. American Coal Co. of Allegany Co.*, 7 Lans. 317; see, also, *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 83. Beals was a witness to the original assignment to the plaintiff, was an officer of the company, and took the transfer to himself with full knowledge of plaintiff's claim, for a very trifling consideration, and in fraud of plaintiff's rights as the owner of the stock. In view of the facts, Beals has no reason for questioning the plaintiff's title; and the defendant certainly has no valid grounds for claiming that Beals was the owner instead of the plaintiff.

That no demand of the stock was made by Thayer, who was named in the assignment and authorized to make the transfer on the books of the company, was not important. If he was unwilling or neglected to do so, it would not deprive the plaintiff of her right, as the owner of the stock, to a transfer of the same. But the demand and refusal was admitted by the answer; and when the

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plaintiff rested, it was stated that the demand and refusal was admitted by the pleadings, and no claim made to the contrary, or exception taken to such statement.

There was no error in the fourth finding of fact, which was to the effect that Cushman transferred the certificate of stock for a good consideration; and there was sufficient evidence to sustain such finding. That money was not paid, and that it was a gift to the plaintiff, does not impair or affect the validity of the assignment of the same. For similar reasons, the fourth and fifth requests to find were properly refused. The subsequent power of attorney and transfer to Beals, without the certificate, could not affect or impair the validity of the previous assignment to the plaintiff; and as we have already seen, Beals acquired no right under the same.

As the case is presented, there are no facts to authorize the conclusion that the transfer to the plaintiff was revoked by the assignment and power of attorney subsequently executed to Beals; and he acquired no title thereby. The acts of Cushman, in attempting to transfer stock to which he had no title, and of Beals, in accepting the same with full knowledge of that fact, could not affect the plaintiff's ownership in any form; and any transfer on the books of the company would be utterly unavailable in conferring any title upon Beals. The assignment was absolute to the plaintiff; and Cushman had reserved no right to make any other or different disposition of the stock, and was without any authority to do so. Beals was fully acquainted with the facts; and in accepting a transfer, and claiming under the same, he acquired no title whatever.

The objection that Beals was not a party was not taken upon the trial. It was so stated, and a request made by the counsel for the respective parties that the action proceed without making him a party. There was a clear waiver of the point and it is not presented in the appeal book. The motion made for a jury trial was also properly refused. The action was of an equitable nature; and hence the right to a trial by jury did not exist, as a matter of course. The suggestion that the plaintiff cannot recover, because the assignment of the certificate was in blank, and that another name was inserted as attorney to make the transfer, does not appear to have been made upon the trial. Nor is there any finding, or request to find, which presents the point upon this appeal; and therefore the question does not now arise. The position of the defendant's counsel that the Court of Chancery has no jurisdiction over matters

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respecting corporations, in cases of this kind, because no trust exists, is without force. The authorities to which reference has been had, we think, fully establish that no such rule should obtain when the right to a transfer of stock can be upheld on equitable grounds. The jurisdiction which courts of equity exercise over individuals extends equally to acts done, or omitted to be done, by private or municipal corporations. Willard's Eq. Jur. 397. And the power to compel a transfer of specific property is a salutary one, and should be exercised where such relief alone will work a complete and ample remedy. We have most carefully considered the various grounds urged by the defendant's counsel, and are unable to find any error which will authorize a reversal of the judgment.

It must therefore be affirmed.

All concur.

Judgment affirmed.

RATHBUN V. CITIZENS' STEAMBOAT COMPANY.

(76 N. Y. 378.)

Agency — to collect — "C. O. D." — acceptance of check by consignor.

The plaintiff shipped goods by the defendant, a common carrier, marked "C. O. D. \$94.28." The defendant took the consignee's check for the amount and delivered it to the plaintiff, who accepted it without objection. It proving worthless, *held*, that the plaintiff had no right of action against the defendant, even although the drawer had no funds at the bank when the check was drawn.

THE opinion states the case. The plaintiff had judgment below, which was reversed at General Term.

Samuel Hand, for appellants. This was a case of mutual contract and not of agency. *Sturges v. Crownshield*, 4 Wheat. 197; 2 Bl. Com. 466; Metc. Com. 14; 1 Burr. L. Dict. 72; 2 id. 336; 1 Bouv. L. Dict. 100; 2 id. 376; Webster's Dict. 1039. There was no ratification by plaintiffs. Story on Agency, § 256; *Lewin v. Dille*, 17 Mo. 64. The taking of the check by defendant violated its contract with plaintiffs. *Collender v. Dinsmore*, 55 N. Y. 200; s. c., 14 Am. Rep. 224. The receiving of the check of the consignee, by plaintiffs, in the absence of an express agreement to accept it as payment, was not a payment by defendant. *Murray v. Gouverneur*,

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2 Johns. Cas. 438; 1 Am. Dec. 177; *Schermerhorn v. Loins*, 7 Johns. 311; *Whitbeck v. Van Ness*, 11 id. 409; *Porter v. Tallcott*, 1 Cow. 359; *Van Steenburgh v. Hoffman*, 15 Barb. 28; *Roberts v. Fisher*, 43 N. Y. 159; *Noel v. Murray*, 3 Ker. 167; *Crane v. McDoual*, 45 Barb. 354; 2 Bouv. L. Dict. 593. If any loss is to be sustained it must be by the party who rendered it possible. *Roberts v. Fisher*, 43 N. Y. 161; *Lickbarrow v. Mason*, 1 Smith's L. C. 854. The acceptance of the check by plaintiffs was not a ratification of defendant's receiving it. *Walker v. Walker*, 5 Heisk. 425; Story on Agency, §§ 192, 244; *Nixon v. Palmer*, 8 N. Y. 401; *Seymour v. Wyckoff*, 10 id. 224.

Andrew H. H. Dawson, for respondent.

CHURCH, C. J. The transaction developed in this case is not an uncommon one. The plaintiffs in New York consigned to one Van Alstyne articles of personal property, and forwarded the same by defendant marked "C. O. D., \$94.28." It was in effect evidently intended as a sale by plaintiffs to Van Alstyne of the property, the price payable on delivery. The defendant undertook to deliver the property, and collect the money and return it to the plaintiffs. The defendant accepted a check of Van Alstyne on a Troy bank, payable to the order of the plaintiffs, and delivered it to the plaintiffs who accepted it, and transmitted it for collection, and it was returned protested. There is no dispute but that the defendant would have been liable if the plaintiffs had refused to accept the check, or had accepted it in a qualified manner, but the question is whether the unconditional acceptance of the check did not amount to a waiver of the requirement to collect the money, or a ratification of the act of receiving the check in lieu of the money. The learned counsel for the plaintiffs relies mainly upon two positions: 1st. That this is the case of receiving a note or check of a third person for an antecedent debt or obligation, the rule being that such note or check is not to be deemed a payment unless an agreement to that effect is made. 2d. That it is not a ratification because the principal was ignorant of the fact that there were no funds.

As to the first proposition the answer is, that there was no pre-existing debt, the payment over of the collection was but the consummation of a single transaction. The defendant received this check as money; it was optional with the plaintiffs to receive it as

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such, or not. It was delivered to them as such. The only rational construction of the transaction, if put in language, is, that the defendant said, I delivered your property, and took this check instead of money, will you receive it as such? to which the plaintiffs assented, and accepted it. It would be unnatural to construe it as an offer to turn out the check of a third person upon a pre-existing debt. True, the defendant had done an act which would fix a liability upon it for the amount if the plaintiffs had so elected, but it was competent for them to waive the strict performance of this part of the contract.

As to the second point it is insisted that the acceptance of the check is not a ratification, because the principal did not have knowledge of all the facts. It is a general rule, that knowledge of all material facts is indispensable, in order to bind the principal by a ratification. Story on Agency, § 243; *Nixon v. Palmer*, 8 N. Y. 401; *Seymour v. Wyckoff*, 10 id. 224. But a ratification, when fairly made, is equal to an original authority. Story on Agency, § 244, and cases cited. What facts were unknown to the plaintiffs at the time they received the check? The check was genuine in its execution, it was made by the person to whom the property was delivered, and it is significant that it was made payable to the order of the plaintiffs, implying that it was intended to be delivered to them. It does not appear whether the drawer had funds in the bank at the time it was drawn, or not. It is presumed that he did not at the time it was presented, and this was not known to the plaintiffs, and from the nature of the case could not be known. A depositor may withdraw funds, although there are outstanding checks. It seems to me that whether there were funds in the bank at the time of accepting the check or not, or whether they had been withdrawn intermediate the drawing and acceptance of the check, is not material upon this question, and that the plaintiffs by accepting the check took that risk. The question presented to them was whether they would adopt the act of the carrier by taking a check instead of money. The risk of non-payment when presented was necessarily assumed. There was no suppression on the part of the carrier, nor does it appear that any fact had occurred between the making and acceptance of the check. It is argued that the plaintiffs were merely aiding the carrier to get the money. If that was their intention, they should have made a qualified acceptance. If they had done this, or had refused the check, the carrier might

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have returned it, and procured the money. By an unqualified acceptance they gave the carrier to understand that they adopted his act. *Brooks v. Express Co.*, 14 Hun, 364.

The case of *Walker v. Walker*, 5 Heisk. 425, gives some countenance to the contention of the plaintiff. There an agent in one State collected money for his principal in another under instructions to remit by express. Instead of doing so, he purchased a check on New York from a firm in good standing, and sent it by mail to the principal. It was sent the 6th of February, but was delayed so that it was not received until the 17th of April, and the principal forwarded it to New York for payment. On the 13th of April the maker failed, and the check was not paid, and it was held that taking and transmitting it to New York was not a ratification, because the failure of the drawer was unknown to the principal at the time he received it.

In this case there was no such intervening fact. There was an apparent necessity for forwarding the check to prevent a discharge of the maker by *laches*, and hence the act was not entirely inconsistent with the continued liability of the agent. Some stress too was laid upon a letter written by the agent the day before the receipt of the check, from which an inference was drawn that he regarded himself liable if the check was not paid, and the check was drawn by a person entirely unknown to the principal, who necessarily relied upon the representations of the agent as to his credit and solvency. Under these circumstances it was held by a divided court that the act of transmitting was not a ratification. Whether the decision in that case was right or not, I do not think it controlling in this case. The circumstances here are capable of but one construction according to the mode and habits of business, and that is, that the plaintiffs adopted and ratified the act of the carrier, by the unqualified acceptance of the check.

The judgment must be affirmed.

All concur, except ANDREWS, J., not voting.

Judgment affirmed.

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(78 N. Y. 402.)

Carrier — drawing-room car — rights of travellers in.

A passenger on defendant's railway, finding no vacant seats in the ordinary coaches, the seats being occupied either by passengers or their baggage, proceeded to a drawing-room car, owned by a private individual, but forming part of the train, and regularly run with it by contract with the defendant, and there took a seat. When called on for extra fare for that seat, he refused, announcing his readiness to go into the other cars if a seat were provided for him there. Thereupon the porter of the drawing-room car, employed by its owner, attempted to eject him. *Held*, that the defendant was liable for this assault.

ACTION for assault. The opinion states the facts. The plaintiff had judgment below.

Edward Harris, for appellant. The porter of the drawing-room car was not defendant's servant. Story on Part., § 49; 3 Kent's Com., note *b*, and cases cited; *Burckle v. Eckart*, 1 Den. 340; s. c., 3 Comst. 137; *Lewis v. Greider*, 51 N. Y. 231; *Leggett v. Hyde*, 58 id. 272; s. c., 17 Am. Rep. 244; *Blair v. Erie R'y*, 65 N. Y. 313; s. c., 23 Am. Rep. 55. This defendant is not liable for the wrongful acts of Wagner or his agents. *Morely v. Dunscombe*, Q. B., 11 L. T. 199; *Powles v. Hider*, 6 Ell. & Bla. 207. The court erred in charging the jury that if plaintiff could find no seat in the ordinary car, he was justified in passing into the drawing-room car. *Cox v. The Defendant*, 6 N. Y. Sup. Ct. 405; *Peck v. Same*, id.

Rollin Tracy, for respondent.

ANDREWS, J. The defendant's counsel, upon the conclusion of the evidence, moved for a nonsuit, on the ground that the porter, by whom the alleged assault was committed, was not the servant of the defendant, and that the defendant was not therefore responsible for his acts.

The plaintiff was a passenger on the defendant's train. He entered the cars at Syracuse, with the intention of riding in one of the ordinary cars to Auburn. He passed through the two ordinary cars attached to the train, and finding no vacant seat passed into the

drawing-room car, and when called upon by the porter to pay the extra charge for a seat in that car, declined to pay the sum demanded, for the reason that he could find no seat elsewhere, but expressed a willingness to leave the car, whenever he could get a seat in the other cars. The porter thereupon attempted to eject the plaintiff from the car, and for this assault the action is brought.

The proof shows that all the seats in the two ordinary cars were occupied, and that several persons were compelled to stand in the passage-way, and others were seated on the wood-box, for want of other accommodation. The ground upon which the motion for nonsuit was made assumes, that under the circumstances, the plaintiff was justified in going into the drawing-room car, and that the act of the porter, in attempting to eject him, was an unjustifiable assault, but the claim is made, and the exception to the refusal to nonsuit is sought to be supported, on the ground that the porter was the servant of Wagner, the owner of the drawing-room car, and was not, in fact or law, the servant of the defendant.

If the right of plaintiff to maintain this action depends upon the existence of the conventional relation of master and servant between the defendant and the porter at the time of the transaction in question, the action cannot be maintained. The porter was in fact the servant of Wagner. Wagner employed him, paid him, and could at any time discharge him. His duty was to take charge of the drawing-room car on the train, assign seats to passengers desiring seats therein, and collect and receive the sums charged therefor. He was instructed by Wagner to remove from the car persons who refused to pay the extra fare, and looking at the contract of employment only, he was, in attempting to remove the plaintiff, acting as Wagner's servant.

The general principle is well settled, that to make one person responsible for the negligent or tortious act of another, the relation of principal and agent, or master and servant, must be shown to have existed at the time, and in respect to the transaction between the wrong-doer and the person sought to be charged. Upon this relation the doctrine of *respondeat superior* rests. *Laugher v. Forister*, 5 B. & C. 547; *Blake v. Ferris*, 1 Seld. 48. The defendant relies upon the absence of this relation between the porter and the company as conclusive against its liability for his act. But we are of opinion that this defense is not available to the defendant, or rather that the persons in charge of the drawing-room

car are to be regarded and treated, in respect of their dealings with passengers, as the servants of the defendant, and that the defendant is responsible for their acts to the same extent as if they were directly employed by the company.

The contract between the company and Wagner was proved. By this contract Wagner agreed, at his own cost, to place upon the defendant's road as many drawing-room cars as should be required for the accommodation of the defendant's traffic, and to do certain specified repairs, and provide conductors and porters, who were to have charge of the distribution of compartments and seats therein, free from interference by the conductor of the train. The train conductors, by the terms of the agreement, are entitled at all times to enter the cars, for the purpose of collecting fares of passengers, or for any purpose connected with the management of the train, and it is made the duty of the conductors and porters of the drawing-room cars to assist the train conductors in enforcing the order and discipline of the road. The contract provides for a monthly accounting by Wagner to the defendant of the receipts and earnings of the business, and the payment by him to the defendant of twenty *per cent* of the gross earnings, after deducting license fees paid for any patented inventions used in the cars, which payment is expressed to be in consideration of the service performed by the defendant in hauling the cars, furnishing fuel and lights therefor, and repairing the trucks, brakes and exterior of the cars, as provided in the agreement. The agreement reserves to the defendant the right to determine the location of the drawing-room cars in its trains.

The business of running drawing-room cars in connection with ordinary passenger cars has become one of the common incidents of passenger traffic on the leading railroads of the country. These cars are mingled with the other cars of the company, and are open to all who desire to enter them, and who are willing to pay a sum in addition to the ordinary fare, for the special accommodation afforded by them. They are put on presumably in the interest of the road. They form a part of the train, and the manner of conducting the business is an invitation by the company to the public to use them, upon the condition of paying the extra compensation charged. Passengers cannot know what private or special arrangement, if any, exists between the company and third persons, under which this part of the business is conducted, and they have, we

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think, in taking one of these cars, a right to assume that they are there under a contract with the company, and that the servants in charge of the drawing-room cars are its servants. Otherwise there would be two separate contracts in the case of each passenger in these cars, one with the company, and one with Wagner. Such a condition of things would involve a confusion of rights and obligations, and divide a responsibility which ought to be single and definite. Take the case of a passenger in a drawing-room car who should be burned by the negligent upsetting or breaking of a lamp by the porter, or the case of a passenger in a sleeping car, injured by the porter's negligence. Is the passenger, in these or other similar cases which might be supposed, to be turned over, for his remedy, against Wagner, on the ground that the servant who caused the injury was his servant, and not the defendant's? The public interest and due protection to the rights of passengers require that the railroad company, which is exercising the franchise of operating the road for the carriage of passengers, should be charged with and responsible for the management of the train, and that all persons employed thereon should, as to passengers, be deemed to be the servants of the corporation.

The statute for the incorporation of railroad companies contains various provisions regulating the manner in which the discipline of the train and the rights of the companies against passengers are to be enforced, and they assume that the servants employed on the train are the servants of the company. The thirtieth section, *Laws of 1850*, chapter 140, requires that all servants of the corporation employed on a passenger train shall wear a badge, which shall indicate their office, and prohibits any officer or servant, without such badge, from meddling or interfering with any passenger, his baggage or property. The thirty-sixth section authorizes the conductors or servants of the corporation to put passengers off the cars who shall refuse to pay their fare. These sections imply that the persons charged with the duty of enforcing the discipline of the train are the servants of the corporation.

The servants employed in the Wagner car are, by the contract between him and the defendant, required to assist the train conductors in enforcing the discipline of the road. It is not contended, indeed the inference from the evidence is clear, that the practice is for the conductor and porter of the drawing-room cars to enforce the regulations under which passengers are permitted to use them,

and that they act, in so doing, with the knowledge of the defendant. Their acts, in the execution of this duty, upon every reason of policy and propriety, should be deemed to be the acts of the company. The legislature in 1858 authorized sleeping cars to be put upon a railroad by a patentee, with the consent of the company, and an extra charge to be made to passengers using them; but the act carefully provides that it should not be construed to exonerate the company from the payment of damages for injuries, in the same way and to the same extent as if the cars were owned and provided by the company. Laws of 1858, ch. 125.

The claim of immunity from responsibility for the acts of the porter, urged on behalf of the defendant, cannot and ought not to be allowed, and the motion for nonsuit was therefore properly overruled.

A single additional question remains to be considered. The defendant's counsel requested the court to charge the jury that if the plaintiff, when he passed through the cars, saw that seats were occupied with luggage, it was his duty, when he met the conductor, to ask him for a seat, before passing into the drawing-room car. The court declined to so charge, and the defendant's counsel excepted.

We are of opinion, that in view of the facts in the case, the request was properly refused. There is some evidence tending to show that one or more of the seats in the ordinary cars were occupied by one person with his luggage, but it does not appear that if the luggage from the seats so occupied had been removed, there would have been sufficient seats for the passengers standing in the passage-way, when the plaintiff passed through the cars. The inference from the evidence is that there would not have been. Under these circumstances, the plaintiff cannot be deemed a wrong-doer, in passing into the drawing-room car and taking a seat, until seats in the other cars should be vacated. It was the duty of the defendant to furnish him a seat. His omission to speak to the conductor and ask for a seat, when he first met him, may reasonably be accounted for on the ground that he supposed that such a request, at that time, would be unavailing. So far as appears, there was no regulation — at least none known to the plaintiff — prohibiting a passenger not intending to ride in a drawing-room car from entering it for a temporary purpose, under circumstances such as existed in this case.

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If the plaintiff was mistaken as to the rules, his mistake did not convert him into a trespasser, and on the first opportunity after entering the car, he informed the servant in charge that he would leave the car as soon as a seat in the other car was provided. See *Willis v. Long Island R. R. Co.*, 34 N. Y. 670.

We think there was no error committed on the trial, and the judgment should therefore be affirmed.

All concur, except RAPALLO, J., not voting.

Judgment affirmed.

 WHITED V. GERMANIA FIRE INSURANCE COMPANY.

(76 N. Y. 415.)

Insurance — condition — waiver.

A fire policy provided that if the insured property should be sold, or the interest of the assured was not truly stated, the policy should be void; that nothing but a distinct specific agreement indorsed on the policy should be construed a waiver; and that any person who procured the insurance should be deemed the agent of the insured and not of the company in all transactions concerning the insurance. The policy was procured through H., the duly authorized agent of the company, who countersigned it as defendant's agent, and it was three times renewed, each receipt, signed by the president and secretary, providing that it was not valid unless countersigned by the defendant's duly authorized agent, and being signed by H. as agent, he receiving the premiums and transmitting them to the defendant. On the third renewal the plaintiff informed H. that he had sold the premises and taken a mortgage on them. H. said he would "make it all right." In an action on the policy, *held*, that the defendant was bound by H.'s acts, that the conditions were waived, and the policy was in force.*

ACTION on a policy of insurance. The opinion states the facts. The plaintiff had judgment below.

B. C. Chatwood, for appellant. A breach of a condition will avoid a policy of insurance. *Jennings v. Chenango Mut. Ins. Co.*, 2 Den. 75; *Jube v. Brooklyn Fire Ins. Co.*, 28 Barb. 412; *Pindar v. Resolute Fire Ins. Co.*, 47 N. Y. 114. The statement of ownership is material. *Merrill v. Farmers & Mech. Fire Co.*, 48 Ma. 485.

* To same effect, *Piedmont & Arlington L. Ins. Co. v. Young* (68 Ala. 476), 20 Am. Rep. 770, and note 777.

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The notice of change of title to the agent, if one was given, was not binding on defendant. *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47; s. c., 20 Am. Rep. 451; *Alexander v. The Same*, 66 N. Y. 464; s. c., 23 Am. Rep. 76; *Loring v. Manufac. Ins. Co.*, 8 Gray, 28.

W. A. Poucher, for respondent.

FOLGER, J. This is an action upon a policy of insurance against loss or damage by fire. The policy was, at the start, made to the plaintiff, on his two-story frame dwelling-house; to him as owner of it. It began the risk in 1869, and ended it in 1870. The policy was signed by the president and secretary of the defendant, and was countersigned by "O. J. Harmon, Agent." It was renewed in 1870, for one year; into 1871. The renewal certificate was signed by the president and secretary of the company; it in terms insured the plaintiff and continued in force the policy for one year longer; and had in it this phrase: "Not valid unless countersigned by the duly authorized agent of the company at Oswego, New York;" and it was "countersigned at Oswego, the 11th of October, 1870, by O. J. Harmon, Agent." It was renewed in 1871, for one year; into 1872. A like certificate of renewal, signed and countersigned by the same three officials, was given for that term. In November, 1871, the plaintiff sold and conveyed the premises insured. But in 1872, he applied, in the life-time of it, for a renewal of his policy; and then the plaintiff told Harmon (the person who had, as agent, as defendant's agent, countersigned the policy, and the two renewal certificates already named) that the premises had been sold, and to whom, and showed to him the mortgage on the premises that had been taken for a part of the purchase-money, and paid to Harmon the premium for another renewal. Harmon said to plaintiff that he would "make it all right;" and gave him another renewal certificate. This certificate was like, in all respects, the two before given. signed and countersigned as those were. Harmon was, as the facts show, the duly authorized agent of the defendant at Oswego, and did all of the business of it there, save to settle losses. He sent to the defendant the premiums that he had received from the plaintiff. It is inferable that he made known to it, when he sent them, that he had received them on renewals of a policy, and of what policy.

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The defense against the action is: That the policy contained certain conditions, and that they were broken by the plaintiff: First, that if the property insured should be sold, the policy should become void; and that it was sold. Second, that if the interest of the assured in the property is not truly stated in it, it should become void; and that the interest of the plaintiff in the property became that of a mortgagee, and was not so stated in the policy, nor in the renewal certificates. Third, that any thing less than a distinct, specific agreement, clearly expressed, and indorsed on the policy, should not be construed as a waiver of any condition therein.

Those conditions do appear in the policy, and it is true that the relation of the plaintiff did change, as is alleged, and that the change is not noted in, or indorsed in writing on, the policy, or either of the certificates.

But the plaintiff puts in the way of that defense, that the defendant waived those conditions.

Upon the facts in the case, as settled by the verdict, there was a parol waiver of the conditions rested upon by the defendant; and a parol consent to keep on foot the insurance of the plaintiff, in his new *status* of mortgagee, if Harmon was the agent of the defendant, in the dealing for the last renewal, and not the agent of the plaintiff. *Fish v. Cottenet*, 44 N. Y. 538; *Shearman v. Niagara Fire Ins. Co.*, 46 id. 526; *Pechner v. Phoenix Ins. Co.*, 65 id. 195; *Van Schoick v. Niagara Fire Ins. Co.*, 68 id. 434; *Bidwell v. No. West Ins. Co.*, 24 id. 302. That he was the agent of the defendant it would be fatuous to deny, were it not for a clause in the policy, upon which the defendant builds. That clause is in this wise: That any person other than the assured, who may have procured the insurance to be taken, shall be deemed to be the agent of the assured, and not of the company, under any circumstances whatever, or in any transaction relating to this insurance. That clause we have held to be forceful, in *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47; s. c., 7 Am. Rep. 380, and *Alexander v. Same Defendant*, 66 N. Y. 464; s. c., 23 Am. Rep. 76. We have not held it so, as yet, further than the scope of the facts in those cases. The case in 66 New York hangs upon that in 62 New York. In the latter case, it was held, that as the insured had contracted that the person who procured the insurance should be deemed his agent, he must abide by his agreement; and that though, through fault or

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mistake, that person had, in the application for a policy, mis-stated to the company the declarations of the assured, whereby there had been wrought an untrue representation, yet that as he has been agreed upon as the agent of the insured, the insured must suffer for the error or the wrong. That case dealt with matters before the issuing of the policy. It is so, that the clause in the policy is broad, and takes into the fold of its wording any circumstances whatever, and any transaction relating to the insurance. In its verbal scope, it has to do with acts as well after, as before and at the time of, the giving out of the policy. But if the insured is to be now bound as having thus contracted, there must be mutuality in the contract. No man can serve two masters. If the procurer of the insurance is to be deemed the agent of the insured, and Harmon is to be deemed such procurer, he may not be taken into the service of the insurer as its agent also; or if he is so taken, the insurer must be bound by his acts and words, when he stands in its place, and moves and speaks as one having authority from it; and *pro hac vice*, at least, he does then rightfully put off his agency for the insured, and put on that for the insurer. Hence it was that in *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128, we held, that the same clause, in the policy there put out by that defendant, did not make the insured the principal. In that policy the insurer had, besides the clause just named, put the condition hostile to it that the application must be made out by an authorized agent of the insurer; and we held that the latter swallowed down the former. In the case in hand, the defendant has declared, over the hands of its president and secretary, that a renewal certificate from it will not be valid, unless countersigned by the duly authorized agent of the company at Oswego, New York. It had before sent two such certificates to Harmon, which he had countersigned as such agent, and delivered to the plaintiff. The plaintiff had paid to him the premiums for those renewals, and he had sent them to the defendant. The defendant treated these two certificates as valid, because countersigned by Harmon. Thereby it asserted that Harmon was its duly authorized agent. It held him up to the plaintiff as such. It knew, then, that those certificates had been put out and taken as valid; and it must have known that it was so, because Harmon thought, and the plaintiff thought, and that both had reason from the conduct of the defendant to think, that Harmon was the duly authorized agent of the defendant. It

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is too late, after letting those two go out as valid, and the third like certificate has been issued and premium paid, for it to say, that Harmon is not the agent of the defendant therein, and that he is the agent of the plaintiff. The defendant must have some living, sentient touch, of those doing business with it; and when it reposes confidence in the actor therein, and gives him discretionary power to bind and loose, it is idle to say that he is not its agent thereto. The law is too severe to brook such an absurdity. Nor will it hold the plaintiff so strictly to the contract he made, as to permit the defendant to ignore it and take his agent as its agent, and yet make him suffer for all the shortcomings of that person while acting between them, and while under authority from the defendant to act for it. Should it be granted that Harmon was the agent of the plaintiff, even then comes in the rule that one employing the agent of another cannot take advantage from the acts and omissions of that agent to the harm of his principal. It is a rule, that if one principal to a contract deal surreptitiously with the agent of the other principal, it is a fraud upon the other principal. The defrauded one, if he comes in time, is entitled at his option to have the contract rescinded; or if he elects not to have it rescinded, to have such other adequate relief as the court may think right to give him. *P. and S. P. Tel. Co. v. Ind. Rub., Gut. Perch. and Tel. W. Co.*, 10 Ch. App. Cas. 526. The principle should be applied in the case in hand to the aid of Whited.

The case, then, is that of the holder of a policy asking for a renewal of it, and making known to the agent of the insurer the facts which have made, or will make, a breach of some of the conditions in it, and thereupon receiving from that agent a written renewal certificate, after payment and receipt of the premium, and having from him a promise that he would "make it all right." The powers of the agent were such, as that the transaction with him was the same as if done with the defendant; it is bound as fully as if it were so.

There was thus a perfect waiver of those conditions of the policy; and it remained a valid contract for another term. When the loss insured against happened, the defendant became liable to pay, and has shown no real defense against the action.

The motions for a dismissal of the complaint, the exceptions to rulings, the exceptions to refusals to charge, raise no question not taken into the foregoing discussion.

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The exceptions to the rejections of questions to a witness are not tenable. The questions were leading, or called for a conclusion, and not for facts. The testimony sought for was not refused; a proper form of inquiry for it was required.

The judgment should be affirmed.

All concur.

Judgment affirmed.

 NEWTON V. MUTUAL BENEFIT LIFE INS. CO

(76 N. Y. 426.)

Insurance — "insanity" — brain disease.

One who has received an injury on the head in childhood, resulting in hardening of the brain, and a weakening of the mental powers in mature age, continuing and increasing till death, and necessitating confinement in an asylum for quiet and treatment, is not afflicted with insanity, within the meaning of an application for life insurance, it appearing that he knew what was going on, and it not appearing that he was subject to delusions or acted irrationally.

ACTION on a policy of life insurance. The opinion states the facts.

The plaintiff was nonsuited at the trial, but this was reversed at General Term. The policy was conditioned to be void if the insured died by his own hand, or any statement in the application should be found untrue. The opinion shows the other facts.

E. H. Prindle, for appellant. The concealment of a material fact when a general question is put by the insurers at the time of effecting the policy, which would elicit that fact will vitiate the policy. *Vose v. Eag. L. and Health Ins. Co.*, 6 Cush. 42; *Rawls v. Am. Mut. L. Ins. Co.*, 27 N. Y. 295; *Smith v. Aetna L. Ins. Co.*, 49 id. 214.

Isaac S. Newton for respondent.

RAPALLO, J. [Omitting a minor point.]

The other branch of the defense, viz., that Ross, in his answers contained in the application for the policy, made an untrue statement in declaring that his father had not died of or been afflicted with insanity, was not in our judgment proved so conclusively as

to justify the court in taking the case from the jury. The question propounded in the application was whether any member of his family (parents, brothers, or sisters) had "died of or been afflicted with insanity, epilepsy, disease of the heart, scrofula, or other hereditary disease," which question he answered in the negative; but in the same paper he stated that his father had died of a brain disease caused by a hurt.

The only evidence introduced by the defendant in support of this defense consisted of copies of two entries in the records of a probate court in the State of Ohio, one dated July 17, 1856, and the other dated October 18, 1856, by each of which it appeared that the probate judge had held Benjamin Ross (the father) to be an insane person and a fit person to be sent to the Northern Ohio Lunatic Asylum, and ordered him to be sent to said asylum for treatment; also extracts from the records of the asylum showing that Benjamin Ross was admitted July 17, 1855, and again on the 20th of October, 1856.

Objections were taken to the admission of these records in evidence. Without now determining whether they were properly proven, or were admissible at all, it is sufficient to say that they certainly were not conclusive evidence against the present plaintiff of the insanity of Benjamin Ross. The only other evidence upon the point consists of the testimony of the widow of Benjamin Ross.

This being a case of nonsuit, the plaintiff is entitled to the most favorable construction of her testimony of which it is capable. She testified among other things that her husband had in his childhood received an injury on the back of his head. That he was for many years before his death afflicted with pains in his head, of which he complained, and used to refer to the hurt he had when he was a child; that later he showed signs of weakening of his mental powers, which continued and increased until his death at the age of about forty-seven years; that he was placed in the lunatic asylum through the kindness of friends, for quiet and treatment, but while there was not confined with the patients but worked in the bakery. It does not appear that he was subject to any delusions or ever acted in an irrational manner, but that he read the newspapers and kept posted on current events. His widow testified further that he seemed sick and seemed to suffer, but that he seemed to know what was going on clear to the end; that there had been no dispute as to what was the trouble with him before he went

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into the asylum : that all pronounced it softening of the brain whom she heard say any thing about it ; that after his death an autopsy was had and the doctors pronounced his disease a hardening of the brain ; that the brain was shown to her and was hard, except in one place, where it was soft, and the doctors said the effect was the same as if he had died of softening of the brain.

Upon this evidence there was, to say the least, very slight, if any, ground for holding that the answer of the assured that his father had died of disease of the brain as distinguished from insanity, in the ordinary acceptation of the term, was not a fair and true answer, especially when the insanity inquired of in the question was classed among hereditary diseases. If there were any question upon this point it clearly was one of fact for the jury, and the mere circumstance that the deceased had been declared insane by a probate judge on an *ex parte* examination, and had been committed to an insane asylum, was clearly insufficient to warrant taking the case from the jury. If every disease of the brain sufficient to cause death was insanity in the view of the company, it was informed of the fact of such disease, and was not misled by the negative answer to the first question, and having issued the policy, and gone on more than six years receiving premiums under it, with knowledge of that fact, it cannot now set up that it constituted a breach of warranty, or misrepresentation which should free it from responsibility.

The order of the General Term should be affirmed and judgment absolute rendered for the plaintiff, with costs.

All concur, except ANDREWS, J., taking no part.

Order affirmed and judgment accordingly.

 PEOPLE EX REL. BRISBANE V. CITY OF BUFFALO.

(76 N. Y. 558.)

Municipal corporation — liability for destruction of buildings to prevent fire — statutory construction.

Defendant's charter authorized its officers to blow up any building on fire, or any other building which it might deem hazardous, and gave the owners a right to damages therefor. The officers, to arrest a fire, blew up a building, and by reason of the explosion the plaintiff's building on the opposite side of the street was shattered. *Held*, that he had no cause of action, although the injury was the natural and probable result of the explosion.*

* See *Keller v. City of Corpus Christi*, post.

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MANDAMUS. The opinion states the facts. The defendant had judgment below.

Henry E. Davies, for appellants. A party is held liable for the natural and ordinary consequence of his acts. 3 Greenl. on Ev., § 14; *Van Pelt v. McGraw*, 4 N. Y. 110; *People v. Orcutt*, 1 Park. Cr. 252; *Stief v. Hart*, 1 N. Y. 20; 1 Kent. Com. 464. The act under which the relators claim damages, being a remedial statute, should be liberally and equitably construed. *Dwarris on Stat.* 632; *Potter's Dwarris on Stat.* 73, 231-236; *Mayor of N. Y. v. Lord*, 17 Wend. 285; s. c., in error, 18 id. 126; *Lord v. The Mayor of N. Y.*, 18 id. 126, 129, 130.

David F. Day, for respondent.

ANDREWS, J. On the 25th day of January, 1865, the then acting chief engineer of the fire department of the city of Buffalo, with the concurrence of the mayor and three aldermen of the city, for the purpose of arresting the progress of a conflagration which had commenced in the American hotel, situated on the west side of Main street in that city, directed a certain other building on the same street, known as the Eagle tavern, adjoining the American hotel on the north, to be blown up with gunpowder. The relators were the owners of a building called the Arcade, situated on the east side of Main street, nearly opposite to the building directed to be blown up, and separated therefrom by the street, which was about 100 feet in width. In pursuance of the direction thus given, the Eagle hotel was blown up and the concussion caused thereby shattered the glass in the building of the relators, whereby they sustained damages to an amount exceeding \$3,000. The referee finds that the blowing up of the Eagle tavern would not necessarily or naturally be expected to injure the walls of the relators' building, but that it was a natural and not improbable consequence that the glass therein would be broken by the explosion and the concussion caused thereby.

This proceeding is instituted to compel the city of Buffalo to assess and pay the damages thus sustained by the relators. The relators base their right to relief upon certain provisions of the defendant's charter. These provisions are contained in sections 9 and 10 of title 10 of the charter (Laws of 1853, ch. 230), which are as follows: "§ 9. When any building in the city is on fire, it

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shall be lawful for the chief or acting chief engineer, with the concurrence of the mayor and any three aldermen, or with the concurrence of any five aldermen, to direct such building or any other buildings which they may deem hazardous, and likely to take fire and communicate to other buildings, to be torn down, or blown up, or destroyed; and no action shall be maintained against any person or against the city therefor. But any person interested in any such building so destroyed or injured, may within three months, and not thereafter, apply in writing to the common council, to assess and pay the damages he has sustained. At the expiration of the three months, if any such application shall have been made, the common council shall either pay the said claimant such sum as shall be agreed upon by them and the claimant for such damages, or shall proceed to ascertain the amount of such damages, and shall provide for the appraisal of the same, and for the assessment, collection and payment of the amount so agreed upon or appraised, in the same manner as is provided by title 8 of this act for the ascertainment, assessment, collection and payment of damages sustained by the taking of property for purposes of public improvement.

§ 10. The commissioners appointed to appraise the damages caused by the pulling down or destruction of such building, shall take into account the probability whether the same would have been destroyed or injured by fire if it had not been so pulled down or destroyed, and may report that no damages should equitably be allowed to such claimant. Whenever a report shall be made and finally confirmed, for the appraising such damages, a compliance with the terms thereof by the common council shall be deemed a full satisfaction of said damages."

The point to be determined is whether the circumstances bring the case within these sections, and entitle the relators to the remedy therein provided.

The right of the legislature to invest the city authorities with the power to destroy buildings in the city to prevent the spread of a conflagration, in cases of imminent and pressing danger, is not questioned. The charter, in this case, simply regulates the manner of exercising a right vested at common law in any person to destroy the property of another, in a great emergency, to stay the ravages of fire or pestilence, and thereby secure the public safety. The legislature committed it to the officers named in the charter to

determine whether the exigency existed which called for the exercise of this extraordinary power, and invested them with authority to direct its exercise; and in the absence of any provision for compensation to the owners of property thus destroyed, the city would incur no liability. The authorities upon this point are conclusive. 2 Kent's Com. 339; *Mayor v. Lord*, 17 Wend. 285; *Stone v. The Mayor*, 25 id. 157; *Russell v. Mayor*, 2 Den. 461.

There is, however, great justice and equity in the claim of one whose property has been thus destroyed to compensation from the public for the loss which he has thereby sustained. His property is taken, in a general sense, for public use, and it is certainly reasonable that he should not be compelled alone to bear the loss rendered necessary for the general good. The charter of the defendant, in the sections quoted, makes a limited and guarded provision for indemnity by the city for losses sustained from the execution of the authority conferred upon the officers designated. But as both the right conferred and the obligation imposed are statutory, the relators must bring themselves within the statute, in order to have the benefit of its provisions.

That the injury to the property of the relators was in consequence of the execution of the direction given by the city officials to blow up the Eagle tavern, clearly appears from the facts found, and also that it was a natural and probable result of the explosion. But the point here is whether the charter applies to the case. It is to be observed that it does not undertake to provide for all injuries to property, resulting from the destruction of buildings to stay the progress of a fire. The damages for which an assessment is authorized are damages "to a building so destroyed or injured." No provision is made for compensation for personal property which may be lost by the destruction of the building in which it is, and if the statute, by construction, may be held to provide compensation for personal property therein belonging to the owner of the building, as a part of his damages, it cannot be extended so as to cover damages sustained by other persons, for the loss of personal property owned by them, which may have been in the building at the time of its destruction. This was expressly held in the case of *Stone v. The Mayor*, 20 Wend. 139, in a case arising in the city of New York under a statute similar to the one in question; s. c., 25 Wend. 156. It is not enough, therefore, to entitle the relators to a remedy under the charter, that it appears that their loss was occasioned by the

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explosion, or that it stands upon the same general equity as the loss of an owner of the building directed to be blown up or destroyed. The legislature has only provided for a single case, and that is for the case of an owner, whose building is blown up or destroyed by the order of the designated city officers. Whether the remedy should be extended to other cases, it is for the legislature to determine. I am of opinion that the case of the relators is not within the statute. The authority conferred upon the officers named in the charter is to direct a building on fire, "or any other building which they may deem hazardous, etc., to be torn down, or blown up, or destroyed;" and the common council are directed to assess and pay the damages sustained "by any person interested in any such building so destroyed or injured." No order or direction was given in respect to the building of the relators. The exigency did not render its destruction necessary, nor was it intended to destroy it. It was not a part of the building directed to be blown up, but was separated therefrom by the intervening street. By the execution of the direction given, incidental injuries resulted to the building of the relators. But the statute was, I think, intended to apply only to cases where the city authorities directed the destruction of the building, for injury to which compensation is claimed, and that it cannot be held, for the purpose of maintaining a claim to compensation, that they directed all the incidental injuries to detached and separate buildings which may naturally have resulted from the blowing up or destruction of the building to which their order related.

The question presented is not free from difficulty; but the limited construction I have given to the charter is, I think, the one indicated by a consideration of its provisions.

For these reasons, the judgment should be affirmed.

All concur.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
OHIO.

DEVEREUX V. BUCKLEY.

(34 Ohio St. 16)

Carrier — delay in delivery — damages.

If a common carrier is chargeable with knowledge that the article carried is intended for market, and unreasonably delays its delivery, and there is a depreciation in the market value of the article at the place of consignment between the time it ought to have been delivered and the time it was in fact delivered, such depreciation will ordinarily constitute the measure of damages.

MOTION for leave to file petition in error, action against a common carrier, for his failure speedily and safely to carry and deliver at New York city, eggs, shipped thither by the plaintiffs, over the Atlantic and Great Western Railroad, of which the defendant is receiver. The plaintiff had judgment below.

Durbin Ward, for the motion. We insist that the damages legally arising from our negligence are to be measured by the terms of our contract, and not by the varying range of the New York market, and these damages consist in the additional cost, if any, to the consignee by the non-arrival of the goods, has been settled in our favor by *Headly v. Bozendale*, 9 Exch. 341; and see Ang. on Car., § 282; *et seq.*; 14 Ill. 156; 19 Barb. 36; 18 Eng. L. & Eq. 557; Sedgw. on Dam. 406, and note; *id.* 72, 73, 74, 78, 79, 80; 1 Dis. 23; 16 N. Y. 489; *Ward v. N. Y. Central R. R.*, 47 *id.* 29; s. o., 7 Am. Rep. 405; 2 Kent's Com. 480; *Deming v. Gr. Tr. R. W.*, 48 N. H.

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455; s. c., 2 Am. Rep. 267; *Home v. Midland R. W. Co.*, 8 Eng. Com. Law, 131; *Walcot v. Mount*, 13 Am. Rep. 438; *Hubbard v. Telegraph Co.*, 33 Wis. 558; s. c., 14 Am. Rep. 775; *Manville v. U. S. Telegraph Co.*, 37 Iowa, 214; s. c., 18 Am. Rep. 8; *Rhodes v. Baird*, 16 Ohio St. 573; *Seeley v. State*, 11 Ohio, 501; *Cin. v. Evans*, 5 Ohio St. 594; *McGregor v. Kilgore*, 6 Ohio, 358; *Louis v. Steamboat Buckeye*, 1 Handy, 150; *Cincinnati Chronicle Co. v. White Line C. T. Co.*, 16 S. C. R. 300.

Wm. E. Ines, contra.

GILMORE, J. The action in the Court of Common Pleas was not brought upon any express or special contract, but to recover damages for a breach of an implied agreement to carry and deliver at the place of consignment, a large lot of eggs, within a reasonable time, by a common carrier.

By failing to answer, the defendant (plaintiff in error) admitted the breach as alleged.

On an inquiry of damages, the court, against the objection of the defendant, permitted testimony to go to the jury tending to prove the market value of eggs at the place of consignment on the day they ought to have been delivered, and their value at that place on the day they were actually delivered, and that their value was less on the latter than on the former day.

Counsel for plaintiff in error contends that the court erred in admitting this testimony to go to the jury, on the ground that the defendant "is only bound to make good the loss which is the natural and legitimate result of his failure to comply with his contract;" and that a loss arising from a depreciation in the market value of eggs at the place of delivery, in consequence of his breach of the contract, is not a natural or legitimate result of such breach.

In support of this proposition, counsel relies very much upon the leading English case of *Hadley v. Baxendale*, 9 Exch. 341.

The rule laid down in that case for the ascertainment of damages in cases of breach of contract is divided into two alternative heads.

Under the first of these, damages are to be allowed which would arise naturally, or according to the usual course of things from the breach of the contract; and, under the second, those which may fairly be supposed to have been contemplated by the parties as the probable result of such breach.

The case before that court fell under the first of these heads, as will appear from the following language, taken from the opinion: "Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants, at the time the contract was made, were that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person?"

And the court was of the opinion that, under those circumstances, the profits of the mill, which were lost in consequence of the breach of the contract to deliver the broken shaft, which was to be used as a pattern for a new one, within a reasonable time, did not constitute such damages as would arise naturally, or according to the usual course of things, from the breach of the contract.

But we do not think that the facts and circumstances of the case before us bring it under the first; but, on the contrary, for reasons that will be stated below, we think it clearly falls under the second of the alternative heads in *Hadley v. Baxendale*, and that the plaintiffs were entitled to recover such damages as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it.

The proposition, as thus stated, is fully sustained by an abundance of authority. *Ward v. New York C. R. R. Co.*, 47 N. Y. 29; s. c., 7 Am. Rep. 405; *Scott v. Boston & New Orleans Steamship Co.*, 106 Mass. 468; *Sedgw. Meas. Dam.* (6th ed.) 79; *id.*, note 81; *Field on Dam.*, § 375; *Griffin v. Colvin*, 16 N. Y. 489; *Cutting v. Grand Trunk R. W. Co.*, 13 Allen, 381.

In view of the doctrine as settled by these authorities, it may be safely said that if a common carrier is chargeable with knowledge that the article carried is intended for the market, and unreasonably delays its delivery, and there is a depreciation in the market value of the article at the place of consignment, between the time it ought to have been delivered and the time it was in fact delivered, such depreciation will, in the absence of any special contract, constitute the measure of damages.

Was the carrier chargeable with such notice in this case? We think he was.

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The anxiety of the plaintiffs to obtain quick time on their shipments of eggs, which was communicated to the defendants' agent, shows that, for some reason, they regarded "time" as an important element in the shipments. The agent, for some reason, appreciated the necessity for quick time in the contemplated shipments; named a time within which he could carry the eggs over his part of the route, and requested to be kept advised by telegraph, so that he might give the eggs his special attention when they reached the point at which he was to receive them. Why this preconcerted arrangement? With the knowledge of business, which their avocations must have put them in possession of, both parties knew that when large quantities of eggs were being shipped to a great city, they were usually, if not always, intended for the market at such city. And the reason why both parties recognized the necessity of quick time in the transportation of the article was that they undoubtedly knew that in this country the market value of eggs was liable to decline at the season of the year in which the shipment was made in this case, and the damages consequent upon such a decline must have been in the contemplation of both parties at the time the contract was made.

Motion overruled.

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(34 Ohio St. 64.)

Extradition — revocation of warrant.

If the governor of one State make a requisition on the governor of another State for the surrender of a fugitive from justice, and the case is shown to be within the provisions of the Constitution of the United States and the act of Congress on the subject, no discretion is vested in the latter governor, but it is his imperative duty to issue his warrant of extradition.

If a warrant for the surrender of a fugitive from justice is obtained in a case in which it should not have been issued, the governor may revoke it, whether issued by himself or his predecessor.

Where such warrant has been revoked by the governor, no inquiry will be made, in a proceeding on *habeas corpus* on behalf of the alleged fugitive, as to the grounds of such revocation, although, at the time of the revocation, the fugitive may have been in custody of the agent of the demanding State. (See note, p. 355.)

HABEAS CORPUS. Corrington was indicted in the Superior Court of Craven county, North Carolina, for embezzling \$85. Ammons was also indicted at the same time, for embezzling \$55.

By virtue of a requisition from the governor of North Carolina, Governor Hayes, of Ohio, issued his warrants for the arrest of Corrington and Ammons, and their rendition, in pursuance of the act of 1875 (72 Ohio L. 79). That act is as follows :

"An Act to regulate the practice of the delivery of fugitives from justice when demanded by another State or Territory. Passed March 23, 1875.

"SECTION 1. *Be it enacted, etc.,* That whenever the executive authority of any other State or Territory of the United States shall demand any person found in this State as a fugitive from such State or Territory, and shall moreover produce with such demand the copy of the indictment found, or affidavit made before a magistrate of the State or Territory demanding, charging the person so demanded with having committed treason, felony, or other crime within such State or Territory, duly certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged fled, it shall be the duty of the governor to issue an order or warrant to the sheriff of the county in which such person so charged may be found, commanding him to forthwith arrest and bring such person before any judge of the Supreme Court, or any judge of the Court of Common Pleas of this State in whose district or jurisdiction such persons so charged may be found, to be examined on said charge.

"SEC. 2. Upon the return of said order or warrant by the sheriff with the person so charged in custody, it shall be the duty of the judge before whom the person so arrested is brought, and order or warrant is returned, to proceed to hear and examine such charge, and upon the proof made in said examination by him adjudged sufficient, to commit such person to the jail of the county in which said examination is so had, for a reasonable time, to be fixed by the judge, and thereupon to cause notice to be given to the executive authority making such demand, or to the duly authorized agent of such executive authority appointed to receive the fugitive, and on payment of all costs such fugitive shall be delivered to the authorized agent of the State or Territory demanding his surrender, to be thence removed to the proper place for prosecution.

"SEC. 3. If no such agent shall appear within such reasonable

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time so fixed by the judge, and pay all costs and receive the person so committed to be surrendered up to the State or Territory demanding, it shall be the duty of the sheriff to discharge the person so imprisoned."

Corrington and Ammons were arrested, and after inquiry, were delivered to Work, as agent of the State of North Carolina in pursuance of the foregoing proceedings. On the same day a writ of *habeas corpus* was issued from the Court of Common Pleas of Hamilton county, requiring Work to produce them before a judge of that court. To this writ Work made separate returns setting forth the proceedings under which they were held.

Subsequently, Governor Young, successor of Governor Hayes, made and issued an order to supersede the warrants so issued by Governor Hayes. The order was in substance as follows:

On consideration, and adopting and following the rule proscribed in the joint resolution of the general assembly, adopted March 25, 1870 (67 Ohio L. 171), as the proper interpretation of the Constitution of the United States and the laws in that behalf, the governor is of opinion that the warrants heretofore issued in this matter were unadvisedly issued, and that the same should be revoked, it appearing that the persons named (Corrington and Ammons) are still within the jurisdiction of the State. It is therefore ordered by the governor that each of said warrants, and the order granting them, be and the same are hereby revoked and cancelled.

"The resolution referred to in the order is as follows:

"Joint resolution, relative to the surrender of persons charged with treason, felony, or other crimes. (67 Ohio L. 171.)

"WHEREAS, The clause in the Constitution of the United States, requiring the surrender of a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, was intended to subserve only great public interests, and not to apply to trivial offenses, or to be made subservient to private interests, by being used to enforce the collection of debts, or to remove a citizen of any State into a foreign jurisdiction, that he might there be served with civil process; and

"WHEREAS, Great abuses have recently been perpetrated in this regard against citizens of this State; and

"WHEREAS, By the practice of all the States, a discretion has been recognized as proper to be exercised by the executive authority

of each State, both as to the cases in which a requisition shall be made for the surrender of an alleged fugitive, and as to those in which the demand shall be granted, and it is proper that this discretion should, as far as possible, be limited and defined; therefore,

"Resolved by the General Assembly of the State of Ohio, That the executive authority of this State, in its action under said clause of the Constitution of the United States, should, in the opinion of the general assembly, be governed by the following rule, both in making requisitions on other States, and in allowing requisitions made by other States on this State, namely: No requisitions should be made or allowed for an alleged fugitive, unless the governor be clearly satisfied that the requisition is sought or made in good faith, for the punishment of an offense within the proper meaning of the said clause of the Constitution, and that it is not sought or made for the purpose of collecting any debt or pecuniary mulct, or for the purpose of removing the alleged fugitive to a foreign jurisdiction, with a view there to serve him with civil process."

On the hearing of the case on *habeas corpus*, the revocation of the warrants was offered in evidence. Work moved to quash the writ, but the motion was overruled and it was held that Corrington and Ammons were illegally restrained of their liberty, and they were discharged from custody. Work brought error.

II. M. Moos and J. M. Pattison, for plaintiff in error, cited Const. of U. S., art. 4, § 2; Act of 1793, 1 U. S. Stat. at Large, 302; Rev. Stats. U. S., § 5278; 67 Ohio L. 171; 72 *id* 73; *Houston v. Moore*, 5 Wheat. 1, 21, 22; *Prigg v. Com. of Penn.*, 16 Pet. 541; *Com. of Ky. v. Dennison*, 24 How. 66; *Sturgis v. Crowninshield*, 4 Wheat. 122, 193; *Moore v. The People*, 14 How. 13; *Ex parte Bushnell*, 9 Ohio St. 77; *Dwarris* (by Potter) on Constr. of Stats. 364; 2 Story on Const., § 429.

John Little, attorney-general, and *Hildebrand & Bruner*, for defendants in error.

OKEY, J. We agree with counsel for the plaintiff in error, that the question in this case is of general, and not merely local, importance. It involves the power of a governor to revoke a warrant of extradition of a fugitive from justice, issued on the requisition of a governor of another State. We are not aware that the question has been presented in the courts of the United States, or in the court of last resort of any State. That it is not free from difficulty is conceded.

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The Constitution of the United States provides, that "a person charged, in any State, with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." (Art. 4, § 2.) To secure uniformity in practice under this provision, Congress, in 1793, passed an act (1 Statutes at Large, 302), which has been slightly changed in phraseology, and is as follows; "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from which the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which said person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months of the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory." U. S. Rev. Stat., § 5278.

The history of the constitutional provision has been so well presented in Hurd on Hab. Cor. (2d ed.) 598-637; *Com. of Ky. v. Denison*, 24 How. 66; *Brown's case*, 112 Mass. 409, and other authorities cited during the argument, that any re-statement of it is perhaps unnecessary. The provision was in the articles of confederation, in substantially the same form, and hence it has been in force a century. It has received the careful consideration of the ablest lawyers in the country, and many questions arising under it may be regarded as settled. No member of this court doubts that when a case intended to be provided for is presented in regular form, the governor on whom the requisition is made has no discretion. It is clearly his duty to issue the warrant of extradition; that duty, however, being one of imperfect obligation. The guilt or innocence

of the accused cannot be tried by him; and, where a crime is actually charged, formal defects as to the manner in which it is stated ought not to be regarded. Nor is it material whether the offense charged is punishable in the State upon which the demand is made; the question is, whether it is punishable as a crime in the demanding State. *Com. of Ky. v. Dennison, supra*; *Davis' case*, 122 Mass. 324.

But it is a mistake to say, that in determining whether a case contemplated in the provision is presented, the governor upon whom the demand is made is vested with no discretion. Under the articles of confederation it was essential that the demand be made on the governor, although this was not expressly so stated; "and it is plain that the mode of the demand and the official authority by and to whom it was addressed, under the confederation, must have been in the minds of the members of the convention when this article was introduced, and that in adopting the same words they manifestly intended to sanction the mode of proceeding practiced under the confederation; that is, of demanding the fugitive from the executive authority, and making it his duty to cause him to be delivered up." *Com. of Ky. v. Dennison*. And this duty is not devolved merely on the person who may at the time be governor. "In such cases the governor acts in his official character, and represents the sovereignty of the State." *Taylor v. Taintor*, 16 Wall. 366-370. Moreover, it is unreasonable to suppose that the framers of the Constitution did not foresee, when they vested this necessary but dangerous power in the chief magistrate of a State, that occasion would arise, in the discharge of such duty, for the exercise of judgment and discretion. In *Taylor v. Taintor*, it is stated that he is vested with discretion to withhold the warrant, where the fugitive is charged with the commission of crime in the State to which he has fled. Is his discretion limited to that instance?

Courts have discharged the fugitive on *habeas corpus*, notwithstanding he was in custody under the warrant of extradition, where the offense charged was not a crime, or not punishable by indictment in the demanding State, or was not triable there as of right by a jury; where the accused had never been, in person, within the demanding State; or where the papers upon which the application was made were forgeries, or plainly insufficient in matter of substance. *People v. Brady*, 56 N. Y. 182. If the courts may rightly discharge in such cases, it is manifest the governor may,

for the same causes, withhold his warrant; and if he may withhold his warrant, it seems reasonable that he should have the power to revoke it on the same grounds. Why should he not have such power? More than one hundred and fifty judges in this State have the unquestioned authority to discharge where the proceeding is plainly invalid by reason of defects in matter of substance; and I am unable to see why the governor, who grants and issues the process, should have less power over it. The tribunal which has exclusive jurisdiction to grant and issue process has ordinarily the power to quash or supersede it, when the fact that it is invalid, or was improperly obtained, is made to appear; and there is no reason for holding that this process is an exception to the rule.

We are further to inquire whether the discretion and power of the governor are limited to cases in which defects of the character above mentioned are found to exist. And it seems to me they are not. The provision was inserted in the articles of confederation; and subsequently in the Constitution, to subserve public, and not private purposes. The object was to secure the punishment of public offenders, and not to enforce the payment of private claims, whether well or ill founded. To employ this extraordinary process for public purposes tends to secure peace and good order; but to prostitute it to the advancement of private ends is to bring it into great disfavor. True, the theory is that the demanding State will hold the offender for trial, even though he be brought into the State fraudulently, or forcibly, and without process; but experience shows that where the end sought is private, the accused is rarely brought to trial. No satisfactory reason is perceived why a governor should issue or obey a requisition where he is satisfied that the sole object of the party complaining is to enforce the payment of a private claim for money. Such an abuse of process is equivalent to a fraudulent use of it. Nor is the governor's power in such case limited to a refusal to act. Judgments the most solemn may be impeached for fraud. Service of process in any civil matter, obtained by fraudulent contrivance or means, will be set aside on motion, whatever the process may be. Pardons obtained by fraud are held to be void. For reasons equally strong, a governor from whom such warrant is obtained for the advancement of private ends, fails to discharge his duty if he neglects to revoke the process on discovering the fraud. No doubt the framers of the Constitution intended to invest him with that power; and the reason for

its exercise, in a case of that sort, is far greater than where the defect, however great, is in the requisition or other documents. Still, where money has been embezzled, or obtained by false pretenses, the offender is not likely to be brought to justice unless the injured party prosecutes; and steps to obtain a restoration of the money are not incompatible with measures to secure the conviction of the fugitive. The duty of the governor, in cases of that class, is therefore one of great delicacy; and all that I have said as to his authority in refusing to issue or obey a requisition, or in revoking a warrant, has relation to cases where there is no real intention to prosecute criminally, if the money demand is satisfied.

There is, as we have seen, no decision of the courts of the United States, or the court of last resort in any State, of the question under consideration. In the absence of such decision, we are warranted, by reason and authority, in looking to the practical construction which the constitutional provision has received in the executive department. We find that men who have occupied the highest positions in the State and Federal governments have expressed strong opinions on the subject. Attorney-General Henry Stanbery, in an opinion to Governor Bebb, referred to by counsel for defendants in error, insists that a governor may, under some circumstances, withhold the warrant. In an opinion of the chief executive of Maine (Governor Fairchild), 6 Am. Jur. 223, he said: There is "no question, in my mind, as to the power to recall the warrant which has been issued in this case." *In the matter of Adams*, 7 Law Reporter, 386, it appears that Governor Thomas W. Bartley revoked the warrant which he had issued for one charged with obtaining money by false pretenses. On July 6, 1857, Governor Salmon P. Chase revoked a warrant he had issued on the requisition of the governor of Illinois; and this was done, it appears, after full argument by learned counsel. In one case, Governor John Brough stated on the record, as a reason for the revocation, that "soon after the issuing of the warrant, information was received that this requisition had been obtained for an ulterior object." In another case, Governor J. D. Cox, in revoking a warrant, says it was done "on affidavits showing that the complainant in the case is unworthy of belief, and that the affidavits on which the requisition was issued were made under an assumed name." Without multiplying instances, it appears from the abstract of the records in the executive department, and the case in 7 Law Reporter, 386, that Governors

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Thomas W. Bartley, S. P. Chase, John Brough, J. D. Cox, R. B. Hayes, William Allen, and Thomas L. Young, each, in one form or another, revoked a warrant of extradition, and some of them exercised that authority repeatedly; and it is well known that other governors of this and other States have often exercised the same power.

If we should hold that the governor has no power of revocation where the objection only goes to the sufficiency of the papers, in matter of form, or the motives of the party complaining, the same result would follow. We have seen in *Taylor v. Taintor*, *supra*, that the governor has the authority to withhold the warrant where the fugitive is in custody, charged with the commission of crime in the State where he has taken refuge; it cannot be doubted that he should also withhold it where it is made to appear that the requisition is a forgery; nor can any serious question be made, if, in either of these cases, the warrant has inadvertently been issued, about his right to revoke the process. As the governor had power to revoke them for some causes, the court below properly held that no inquiry could be made on *habeas corpus* as to the particular ground upon which these warrants were revoked. Indeed, while the courts will discharge a fugitive on *habeas corpus*, where the proceedings in his case are void, neither the general nor State government will otherwise interfere with the governor in the discharge of his duty, or failure to discharge it, in cases of this sort. *Com. of Ky. v. Dennison*; *Taylor v. Taintor*; *State of Mississippi v. Johnson*, 4 Wall. 475; *High on Ex. Rem.*, § 120. *State ex rel. v. Chase*, 5 Ohio St. 528, in no way militates against these authorities, for the doctrine was fully recognized in that case, that where the governor is vested with a discretion, his action cannot be controlled by mandamus. In any view, therefore, the court below properly discharged the prisoners from custody.

An objection has been made, that while it might be very proper to revoke a warrant before the fugitive is delivered to the agent of the demanding State, yet that when such delivery is actually made, the power of the governor is at an end, and the general government, and the State in which the crime was committed, have acquired rights which cannot be taken away. In one case, when Governor Allen exercised the power of revocation, the fugitive was in custody of the agent of the demanding State, though he was still within our territorial limits, and he was discharged. How it was in this

respect in the other cases I have referred to does not appear. As we have seen, "the governor acts in his official capacity, and represents the sovereignty of the State," and "if he refuse, there is no means of compulsion." *Taylor v. Taintor*. Exclusive jurisdiction over the subject is vested in him. *TANEY*, C. J., in *Com. of Ky. v. Dennison*, says, "there is no power delegated to the general government, either through the judicial department, or any other department, to use coercive means." He says, furthermore, that "such a power would place every State under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights." *A fortiori*, the demanding State can use no coercive power. "In the event of refusal, the State making the demand must submit. There is no alternative." *Taylor v. Taintor*. If the executive of the demanding State had the authority, through his agent, to remove the fugitive from the State of refuge, in opposition to the will of its executive, he would have the right to send an army to enforce the authority, and no one is bold enough to claim that this may be done. The fact is, the warrant of extradition is, in substance, a consent to remove the alleged criminal beyond our territorial limits, and there can be no removal without a valid warrant. *Botts v. Williams*, 17 B. Monr. 687. An independent government does not hesitate to arrest the removal of a fugitive at any time before he is taken beyond the nation's territorial limits, if it be discovered the case is not clearly within the extradition treaty. *In re Windsor*, 6 B. & S. (118 Eng. Com. Law) 522; 3 Whart. C. L., § 2973. The governor of a State has precisely the same power, if he discovers that the requisition is a forgery, or that the case is one not intended to be provided for in the constitutional provision; and if he exercises the power cautiously, and only in the cases to which I have referred, or in others of a like character, much may be done to prevent the abuse, without impairing the efficiency of extradition proceedings.

Further objection is made that Governor Young had no authority to revoke a warrant issued by Governor Hayes. But we have seen that "the governor acts in his official capacity." The warrant is not process of the person holding the office of governor, but a warrant issued by an officer. We all agree that Governor Young had the same power to revoke a warrant issued by his predecessor, that he had to revoke one issued by himself.

Much has been said as to the constitutionality of the legislation

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set forth in the statement of this case. There is legislation on the general subject in nearly or quite all the States. Reference to much of it, and the decisions relating to it, will be found in 18 Alb. L. J. 166. The view taken of this case renders it unnecessary for us to express any definite opinion on the subject.

If it is true that the views here expressed are in conflict with some general expressions in *Com. v. Dennison*, it is equally certain that nothing in this opinion will be found in opposition to any thing decided in that case. Expressions in that case cannot be reconciled with some things said in *Taylor v. Taintor*, and yet the decisions are in harmony. Questions of conflict between cases are determined not merely by differences of that sort, but by first ascertaining what may fairly be regarded as decided in each case.

Judgment affirmed.

NOTE BY THE REPORTER.—The article in the ALBANY LAW JOURNAL, referred to in the above opinion, is by Samuel T. Spear, D. D., and is as follows: The Constitution of the United States, in article 4, section 2, provides that "a person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." The first and second sections of the act of Congress, passed in 1793, and substantially reproduced in sections 5278 and 5279 of the Revised Statutes of the United States, provide for giving effect to this constitutional requirement. These sections of the act of 1793, as well as those of the same act relating to the rendition of fugitive slaves, assume that Congress is constitutionally competent to legislate on both of these subjects. Such was the doctrine held by the Supreme Court of the United States in *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539. It follows, of course, that the States can pass no laws inconsistent with the constitutional provision in regard to the extradition of fugitive criminals, or with the legislation of Congress for its execution. Both are parts of "the supreme law of the land;" and neither can be invaded or superseded by the legislative power of the States.

The question, however, has arisen whether legislation or judicial action by the States that is simply auxiliary in its character by seeking to secure the end named in the Constitution, and not in conflict with the regulations prescribed by Congress, is constitutionally excluded by these regulations. Mr. Justice STORY, in stating the opinion of the court in *Prigg v. The Commonwealth of Pennsylvania*, *supra*, used language which seems to answer this question in the affirmative. He said:

"In a general sense, this act may be truly said to cover the whole ground of the Constitution, both as to fugitives from justice and fugitive slaves: that is, it covers both subjects in its enactments; not because it exhausts the remedies which may be applied by Congress to enforce the rights, if the provisions of the act shall in practice be found not to attain the objects of the Constitution; but because it points out fully all the modes of attaining those objects which Congress, in their discretion, have as yet deemed expedient or proper to meet the exigencies of the Constitution. If this be so, then it would seem, upon just principles of construction, that the legislation of Congress, if constitutional, must supersede all State legislation upon the same subject, and by necessary implication prohibit it."

Reference was made to *Houston v. Moore*, 5 Wheat. 1, 21, 22, in which the same court adopted the doctrine "that where Congress have exercised a power over a particular subject given them by the Constitution, it is not competent for State legislation to add to the provisions upon that subject, for that the will of Congress upon the whole subject is as clearly established by what it had not declared as by what it has expressed." Mr. Justice

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STORY remarks that "in such a case, the legislation of Congress, in what it does prescribe manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter."

The actual case before the court related to State legislation in respect to the rendition of fugitive slaves; and what was said about such legislation in regard to fugitives from justice was said only incidentally, "by way of analogy and illustration." The latter subject, differing in many respects from the former, was not really involved in the case at all; and all reference to it might have been omitted.

It is to be observed that neither the Constitution nor the law of Congress takes any cognizance of the case of a fugitive criminal until a demand has been made for his delivery. The former says that he is to be delivered up "on demand of the executive authority of the State from which he fled;" and the latter says that "whenever the executive authority of any State or Territory demands any person as a fugitive from justice," then, the prescribed conditions having been supplied, the designated steps for his delivery shall be taken. The demand is evidently the initial point at which the Constitution and the law begin to operate; and prior to this neither, by its own terms, has any application to the case. The States cannot legislate against the Constitution and the law of Congress, or do any thing to impair the full operation and effect of their provisions, or substitute a different mode of attaining the end; yet it does not follow that the States can do nothing on the subject at that stage in which neither the Constitution nor Federal legislation acts upon it at all, provided that what they do is not inconsistent with the end named in the Constitution, or with what Congress has done for its attainment.

The principle laid down by the Supreme Court of the United States, though strongly stated and perhaps without the necessary qualification, has not by the States been practically understood to exclude legislation of this kind. Mr. Bishop, in his *Criminal Law*, vol. 1, p. 133, says that "statutes have been enacted, in most or all of the States, authorizing the arrest of persons on the charge of being fugitives from the justice of other States, on warrant issued by a magistrate, in advance of the executive demand." This, as he says, has been done in the aid of the "legislation of Congress and for purposes of domestic police." Mr. Hurd, in his work on *Habeas Corpus*, p. 636, suggests that "such legislation by the States, when in no sense opposed to the law of Congress, may be rested upon the general police power of the States which was so ably contended for by Mr. Justice BALDWIN in his opinion delivered in the case of *Holmes v. Jennison*, 14 Pet. 540.

We have an example of such legislation entitled "An act to authorize the arrest and detention of fugitives from justice from other States and Territories of the United States," passed by the Legislature of New York in 1833. See 5 Edmonds' *Statutes at Large*, 167. This act gives to certain officers "power to issue process for the apprehension of a person charged in any State or Territory of the United States with treason, felony, or other crime, who shall flee from justice and be found within this State." It directs that the proceedings shall be similar to those "for the arrest and commitment of persons committing offenses within this State." It provides for the examination of the accused party after the arrest; and if it shall satisfactorily appear that such person has committed a crime in another State or Territory, and is a fugitive from justice, the magistrate issuing the warrant and making the examination is required to commit him to the common jail for a reasonable time, or demand bail, that there may be an opportunity for his arrest "by virtue of the warrant of the executive of this State, issued according to the act of Congress, upon the requisition of the executive authority of the State or Territory in which such fugitive committed such offense." The committing magistrate is directed to give notice of these proceedings to the proper authority in the State or Territory in which the crime is charged to have been committed, "to the end that a demand in pursuance of the act of Congress may be made for the arrest and surrender of said person." This act, for preliminary arrest and detention, takes effect before the law of Congress becomes operative at all, and with the operation terminates. So far from being in conflict with the law, it is auxiliary to its purpose; and on this ground, as well as that of domestic police and general comity among the States, it would seem to be abundantly justified.

In *The Matter of Heyward*, 1 Sandf. 701, coming before the New York Superior Court at Chambers, in 1848, Judge SANDFORD, after adverting to this act, remarked: "It appears that before a magistrate issues his warrant for the arrest of a fugitive from justice from

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another State, there must be a complaint taken on oath before such magistrate, and it must show three things, namely: 1. That a crime has been committed. 2. That the accused person has been charged in the foreign State with the commission of such crime. 3. That he has fled from justice and is found within this State." The prisoner in this case had been arrested on a warrant issued by a police magistrate; and the complaint falling to show the three things specified, the judge discharged him on the ground that the case did not come within the rules of the law.

So, also, in *The Matter of Leland*, 7 Abb. Pr. (N. S.) 64, coming before the same court in 1869, Judge McCunn said: "To enable a magistrate to arrest and examine an alleged fugitive from justice from another State, it must be shown by a complaint in writing on oath that a crime has been committed, that the accused has been charged in that other State with the commission of such crime, and that he has fled therefrom, and is found here. This affidavit is defective in all these particulars." In this case, as in the other, the arrest was made under the law of New York, and not under that of Congress; and in both cases the complaint was not deemed sufficient, according to the provisions of that law, to warrant the proceedings, and hence the prisoners were discharged on *habeas corpus*.

The General Statutes of Massachusetts, in chapter 177, section 7, reproducing, with slight verbal alterations, chapter 142, section 8 of the Revised Statutes, declare that "when a person is found in this State charged with an offense committed in another State or Territory, and liable by the Constitution and laws of the United States to be delivered over upon the demand of the executive of such other State or Territory, any court or magistrate, authorized to issue warrants in criminal cases, may, upon complaint under oath setting forth the offense and such other matters as are necessary to bring the case within the provisions of law, issue a warrant to the person charged before the same or some other court or magistrate within the State, to answer to such complaint as in other cases." Other sections of the chapter provide for the examination of the accused party, and if there be "reasonable cause to believe that the complaint is true," for his imprisonment or holding him to bail, to the end that he may be delivered up in pursuance of the law of Congress. It is made the duty of the governor of the State to make such delivery, when satisfied "that the demand is conformable to law."

In *The Commonwealth v. Tracy et al.*, 5 Metc. 536, the Supreme Court of Massachusetts had occasion to consider the constitutionality of this section of the law, in view of the doctrine stated in *Prigg v. The Commonwealth of Pennsylvania*, *supra*. Chief Justice Shaw, in delivering the opinion of the court, said: "It is a provision obviously not repugnant to the Constitution and laws of the United States, nor tending to impair the rights, or relax the duties, intended to be secured by them. To this extent, therefore, the court are of opinion that this law is constitutional and valid, one that the legislature had authority to pass." The chief justice also said: "A wise government, bound to maintain peace and good order within its territories, and authorized to exercise a salutary vigilance and restraint over all persons within its jurisdiction, may well provide for arresting such persons [fugitive criminals], and subjecting them to a judicial examination, and requiring them to give bail for their appearance and good behavior, or be imprisoned, if they be found to have committed capital offenses in other States, until due inquiry can be made, and all persons injured by them have an opportunity to institute such proceeding, criminal or civil, as justice may require. This general doctrine, as to the State's power, was presented with direct reference to the fact that a person charged with larceny in Virginia, had been arrested under the law of Massachusetts, prior to any requisition from the government of the former State."

Sections second and third of the same Statutes, reproducing for substance, section seventh of chapter 142 of the Revised statutes, provide that the governor of the State, when a demand has been made by the executive authority of another State or Territory, if "satisfied that the demand is conformable to law," shall issue his warrant for the arrest of the fugitive criminal and cause him to be delivered to the duly appointed agent or agents. This part of the law was considered by the same court in *The Commonwealth v. Hall*, 71 Mass. 282. Judge F. GLEW, in stating the opinion of the court, said: "The provision of the Revised Statutes, chapter 142, section 7, authorizing the governor to issue his warrant for the apprehension of the fugitive, was therefore in accordance with the act of Congress; and hence intended to aid in the enforcement of that law, and not being repugnant to any provision of the State Constitution, is not open to the objection urged by the prosecution."

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The Codes and Statutes of California, 1876, vol. 2, pp. 1385, 1386, contain a series of provisions in regard to fugitive criminals, one of which declares that "a person charged in any State or Territory of the United States with treason, felony, or other crime, who shall flee from justice and be found in the State, must on demand of the executive authority of the State or Territory from which he fled, be delivered up by the governor of this State, to be removed to the State having jurisdiction of the crime." Other sections provide for the arrest and detention of the fugitive until he can be arrested and delivered up in conformity with the law of Congress. The Supreme Court of California, in *Ex parte Cubreth*, 8 Cal. 436, held that the law "authorizing the arrest of a fugitive from justice who has fled from another State, before a demand for his surrender by the executive authority of the State from which he fled, and his detention for a reasonable time to afford an opportunity for such executive demand, is not in conflict with the second section of article four of the Constitution of the United States." The chief justice, in stating the opinion of the court, said:

"That while the provision of the Constitution referred to, required that the fugitive should be surrendered upon the demand of the executive of the State in which the crime is charged to have been committed, it did not otherwise, or in the absence of the executive demand, undertake to define the duties or limit the authority of the State within which the fugitive from justice might be found. The Constitution of the United States does not assume to deal with the question, before the proper executive demand shall have been made, while upon the other hand, the statute provides for the detention of the fugitive for a reasonable length of time in advance of, and to afford an opportunity for the executive demand upon which the surrender is to be made. * * * The paramount constitutional duty of the State to make the surrender upon proper executive demand was in nowise in conflict with its reserved power to deal with the fugitive in the absence of such demand." See *Ex parte Rosenblatt*, 51 Cal. 235.

In *The Matter of Romaine*, 23 Cal. 585, the court remarked: "The clause (in the Constitution) applies only to criminals fleeing from one 'State' to another 'State' and does not in express terms apply to those fleeing from a Territory to a State, which is the case now under consideration. This case is not directly provided for by the National Constitution, and we are therefore compelled to look elsewhere for the power to return the parties before us." These parties had been arrested on a warrant issued by the governor of California upon a requisition made by the acting governor of the Territory of Idaho; and the court held the proceeding to be legal under the laws of that State.

In *Robinson v. Flanders*, 29 Ind. 10, it was held that a State law requiring the officer making the arrest to take the party before the nearest judge for identification, is valid. In *Ex parte Joseph Smith*, 3 McLean, 121, it was held that a State law which makes it the duty of the executive to issue the warrant upon a proper requisition is constitutional. See Bump's Notes of Constitutional Decisions, p. 297.

As examples of legislation on the subject by other States, the reader is referred to the Revised Statutes of Illinois by Hurd, pp. 524, 525; the Statutes of Indiana by Davis, vol. 4, pp. 421, 422; the General Statutes of Rhode Island, pp. 569, 570; the General Statutes of New Hampshire, pp. 497, 498; the Revised Statutes of Maine, 1871, pp. 900, 901; the General Statutes of Kentucky, 1877, p. 492; the General Statutes of Connecticut, p. 544; the Code of Virginia, 1873, pp. 200, 201; the Statutes of Tennessee, 1871 sections 5343-5353; and the Code of Georgia, sections 53-57. All the provisions furnished in these examples of State legislation, though differing in minor particulars, are substantially similar in the end at which they aim; and in none of them is there any effort to defeat the purpose of the Constitution, or render ineffective the law of Congress for its execution.

These authorities and also the general practice of the States are sufficient to settle the question that State legislation, with reference to fugitive criminals, not inconsistent with the Constitution or the law of Congress to carry the constitutional provision into effect, is permissible. All or nearly all the States have assumed this proposition and acted upon it. The law of the United States declares that "it shall be the duty" of the governor of a State or Territory to make the delivery of the fugitive criminal, when the conditions specified have been supplied; and a State law imposing and enforcing the same duty is certainly not inconsistent with the legislation of Congress, or with the clause of the Constitu-

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tion which requires the delivery to be made, unless Congress should see fit to provide some other mode for the delivery. So a State law for preliminary arrest and detention, in the exercise of the police power of the State, to secure fugitive criminals until the demand, as provided for by Congress, can be made, simply acts in advance of what Congress has authorized to be done, and does not in any way touch or interfere with the jurisdiction conferred thereby, or the proceedings prescribed. Such legislation on the part of the States cannot be deemed to be excluded by the law of Congress; and we do not think that the Supreme Court of the United States intended such exclusion by the language used in *Prigg v. The Commonwealth of Pennsylvania*. State legislatures and State courts have not so understood the Supreme Court.

WHIPP V. STATE.

(34 Ohio St. 87.)

Criminal law — witness — husband and wife.

In a prosecution of a wife for an assault upon her husband, he is a competent witness for the State.

CONVICTION of felonious assault. The plaintiffs in error, Rachel H. Whipp and Lonsdale P. Spensley, were jointly indicted and tried for, and convicted of a felonious assault upon Robert Whipp, the husband of Rachel, with intent to kill. Robert was permitted, against the objection of both the plaintiffs, to testify to the circumstances of the alleged assault.

H. McKinney, for plaintiff in error. Husband and wife are not competent witnesses for or against each other in criminal prosecutions. *King v. Cliviger*, 2 T. R. 268; 2 Kent's Com. 178 (5th ed.); *Sedgwick v. Watkins*, 1 Ves. Jr. 49; *Thompson v. Trevanion*, Skin. 402; *Bentley v. Cook*, 3 Doug. 422, 1 Greenl. Ev., § 334; *Com. v. Eastland*, 1 Mass. 15; *People v. Bill*, 10 Johns. 95; *Fitch v. Hill*, 11 Mass. 287; *Bathews v. Galindo*, 4 Bing. 610; 3 C. & P. 238; *People v. Colburn*, 1 Wheel. Cr. Cas. 479; 1 Stark. on Ev. 706; 1 Hale's Pl. Cr. 301; 2 Russ. on Crimes, 548, 549; 1 Phillips on Ev. 77; *Steen v. State*, 20 Ohio St. 333.

Isaiah Pillars, attorney-general; *James Pillars*, *John McSweeney*, *J. T. Graves*, prosecuting attorney, and *Bostwick & Barnard*, for the State.

BOYNTON, J. At common law, the general rule is well settled, that husband and wife are incompetent to testify for or against

each other, either in civil or criminal cases. And while the rule has been largely modified in civil cases, and the incompetency to a great extent removed, in criminal cases it still prevails. *Steen v. State*, 20 Ohio St. 333. But at an early date, an exception, said to arise from necessity, was declared to exist in cases of personal injury to the wife inflicted by the husband. The first reported case, in which the point was adjudicated, was that of Lord AUDLEY, decided in 1631. He was accused of aiding and assisting another in the commission of a rape upon his wife; and upon the trial the question of the wife's competency to give evidence against him was submitted to the judges, who unanimously resolved, that being the party upon whom the crime was committed, she was a competent witness.

Excepting a few cases at *nisi prius*, where the wife's testimony was rejected (*Rex v. Griggs*, 1 T. Raym. 1), the exception has uniformly prevailed, and is now as firmly established as the rule itself. *Rex v. Azire*, 1 Stra. 633, was a case of a simple assault by the husband upon the wife, and her testimony was admitted. Where the husband was indicted for shooting at his wife, she was held a competent witness. Roscoe's Cr. Ev. 125. In *Rex v. Jagger*, 1 East's P. C., 455 the husband was tried and convicted of an attempt to poison his wife, and she being admitted as a witness against him, the twelve judges, upon a point reserved, held that her evidence was properly received. *Rex v. Wasson*, 1 Crawf. & Dix, 197, was a similar case, and decided the same way.

In *Woodcock's* case, 1 Leach's C. C. 500, and in *Rex v. John*, 1 East's P. C. 357, the dying declarations of the wife were received against her husband, upon the principle there asserted, that had she survived, she would have been competent to establish the violence that resulted in death.

The same principle prevails in cases where the wife is called by the husband. In *Commonwealth v. Murphy*, 4 Allen, 491, it was held, that on an indictment against the husband, for an assault upon the wife, she is a competent witness for him, to disprove the assault. See, also, *Rex v. Sergeant*, R. & M. 352; *State v. Nel*, 6 Ala. 685.

But it is said that if the rule permitting the wife to testify in these exceptional cases is admitted at all, it is restricted and confined to cases where there are no other witnesses to the transaction in which the wife was injured. This limitation, although adopted

in one or two of the earlier cases, has long since been rejected. In *Bentley v. Cooke*, 3 Doug. 422, it was said by Lord MANSFIELD, that the "necessity which calls for this exception is not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed without remedy to personal injury." And in *Reeve v. Wood*, 5 Best & Smith, 364, CROMPTON, J., giving a wider foundation to the exception, and a more satisfactory reason for its existence, said: "The exception to the general rule, excluding the wife as a witness against her husband, arose partly from the mischief which would have followed from her exclusion, partly from necessity, and partly from the consideration that she was in reality the prosecuting party." The principle upon which either of these cases asserts the competency of the wife in prosecutions for an injury to her person, committed by the husband, renders the presence or absence of third persons, at the time of the assault, entirely immaterial.

It remains to inquire whether the same principle or rule obtains where the husband sustains a personal injury through the unlawful conduct of the wife. We have not been referred to any case directly deciding the point. The elementary writers are fully agreed that the husband is equally competent to testify, where he is the party injured through the personal violence or misbehavior of the wife. In *Best on Evidence*, 271, it is said: "Where one of the married parties used, or threatened, personal violence to the other, the law would not allow the supposed unity of person in the husband and wife to supersede the more important principle that the State is bound to protect the lives and limbs of its citizens. Thus, in an indictment for an assault and battery on the wife, or *vice versa*, the injured party is a competent witness."

In 1 Arch. Cr. Pr. & Pl. 472, the author says: "A wife cannot be examined as a witness for or against her husband, or a husband as a witness for or against his wife, except in case of a personal injury committed by the one upon the other, in which case, from necessity, the one may be a witness against the other." Mr. East, in 1 East's P. C. 455, closes a discussion of the exception to the general rule, by saying: "I conceive it to be now settled, that in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other." 1 Whart. Cr. L., § 767; 1 Greenl. Ev., § 343; 2 Bish. Cr. Pr., § 69; and Stephen's Dig. of Ev., art. 108, are to the same effect.

We are of the opinion that the exception stated prevails where either the husband or wife is on trial for a personal injury inflicted on the other, and that the party injured is a competent witness against the other.

In *Steen v. State, supra*, the court declared the general rule. It was not a case of bodily injury to the wife. The question of the existence of an exception to the rule, excluding the wife from testifying against her husband, was not considered or decided. The remaining exceptions to the ruling of the court below do not present any question the decision of which it is important to report. It is sufficient to say that in our judgment, no error was committed at the trial.

Judgment affirmed.

DUTTONHOFER V. STATE.

(34 Ohio St. 91.)

Criminal law—evidence—confidential communications by prisoner to his attorney.

Where the accused in a criminal trial becomes a witness in his own behalf, he cannot be compelled, on cross-examination, to disclose the confidential communications between himself and his attorney; nor can such disclosures be required of the attorney without the consent of the accused.*

CONVICTION of forgery. On the trial the plaintiff in error was examined as a witness on his own behalf, but in his examination in chief, gave no evidence touching communications passing between him and his attorney. On cross-examination by the State, he was required, against his objection, to disclose written and oral communications which he had made touching the matter to his attorney, and his attorney being called as a witness for the State, was in like manner required to produce letters which as attorney he had received from the prisoner concerning the matter, and these were put in evidence by the State.

Grosvenor & Vorhes, John Cartwright and S. D. Horton, for plaintiff in error.

* See note, 27 Am. Rep. 140.

Isaiah Pillars, attorney-general; *Ira Graham*, prosecuting attorney; *Russell & Russell*, and *John S. Giles*, for defendant in error.

WHITE, C. J. The only question we find it necessary to consider in this case is, whether the court erred in requiring the accused and his attorney to disclose the communications made by the former to the latter in the relation of client and attorney.

It is laid down as a general rule of jurisprudence, that "where an attorney is employed by a client professionally, to transact professional business, all the communications that pass between the client and the attorney in the course and for the purpose of that business are privileged communications, and that the privilege is the privilege of the client and not of the attorney." *Herring v. Cloberry*, 1 Phill. 91; *Pearse v. Pearse*, 1 DeG. & Sm. 25.

The privilege applies to the *communication*; and it is immaterial whether the client is or is not a party to the action in which the question arises, or whether the disclosure is sought from the client or his legal adviser. Wharton's Ev., § 588; Stephens' Ev., art. 115.

By section 314 of the Code of Civil Procedure, an attorney is declared incompetent to testify concerning any communication made to him by his client, in that relation, or his advice thereon, without his client's consent.

Section 315, however, provides, that if a person offer himself as a witness, that is to be deemed a consent to the examination also of the attorney, on the same subject.

The Code of Criminal Procedure contains no such provision; and the question is, whether the accused, by offering himself as a witness in his own behalf in a criminal prosecution, waives the protection which would otherwise be extended to the privileged communications passing between him and his attorney.

We think no such waiver ought to be implied. In several of the States, in the absence of a statutory provision corresponding to section 315 of our Code of Civil Procedure, it has been ruled that a party, by becoming a witness on his own behalf, does not waive the privilege.

In *Bigler v. Reyher*, it was held by the Supreme Court of Indiana, that a party, having given evidence in chief in his own behalf, cannot, on cross-examination, be compelled to divulge statements made by him when consulting, as a client, an attorney at law; and that such communications are privileged and protected

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from inquiry, when the client is a witness, as well as when the attorney is a witness. 43 Ind. 112. To the same effect is the decision in *Barker v. Kuhn*, 38 Iowa, 395; *Hemenway v. Smith*, 28 Vt. 701; and *Bobo v. Bryson*, 21 Ark. 387.

The contrary was held in Massachusetts, in the case of *Inhabitants of Woburn v. Henshaw*, 101 Mass. 200; s. c., 3 Am. Rep. 333. It was there said: "The objection that the defendant was wrongfully compelled to undergo a cross-examination as to what he said to his counsel cannot be sustained. The policy of the law will not allow the counsel himself to make disclosures of confidential communications from his client; but if the client sees fit to be a witness, he makes himself liable to full cross-examination like any other witness."

But we apprehend that other witnesses than the party could not, on cross-examination, be compelled to disclose confidential communications made to their legal adviser, either for the purpose of impeachment or otherwise. Nor do we see the propriety of not allowing the attorney to make the disclosures without the consent of his client, and yet compelling the client himself to make them.

In our opinion, the weight of authority, and the better reason are against the ruling of the court below.

Judgment reversed and cause remanded for a new trial.

Judgment reversed.

 BANK OF CADIZ V. SLEMMONS.

(34 Ohio St. 142.)

National bank — usury — loan to director — estoppel.

Where a National bank makes to one of its directors a loan of money, which in amount and in the rate of interest is in contravention of the National Banking Act, the borrower is not estopped to defend against a recovery of interest. If a payee take from the maker a promissory note, and at the same time surrender the maker's note of an earlier date given for a loan of money, the facts, and not merely what the payee called or considered the transaction, will determine whether it was a renewal or payment of the original loan.

In rendering judgment on a promissory note given to a National bank, in renewal, into which note illegal interest on the original note was incorporated, the whole interest of both notes will be disallowed.

Payments made generally on a promissory note to a National bank, which note embraces illegal interest, will be applied in satisfaction of the principal.

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PROCEEDING to modify judgment. The judgment was on promissory notes, executed to the plaintiff, a National bank. The defendants alleged that the judgment embraced illegal interest. The court found "that said note for \$10,066.37, to the bank, of the date of January 9, 1871, did 'carry with it,' within the meaning of section 30 of the act of Congress, under which the plaintiff was established, the interest calculated on the former notes, amounting to the sum of \$625.14, and which sum must be here held and adjudged to be forfeited under the law; and that the payments made on the note above stated must be applied exclusively to the payment of the principal of the note exclusive of any interest. The court, therefore, finds that the amount legally due on said note on May 23, 1873, the day on which the judgment by confession was entered herein against the defendants, was \$3,268.30."

"Thereupon it is considered and adjudged that the original judgment rendered in this case, by confession, on May 23, 1873, be and the same is hereby modified, so as to stand as a judgment for \$3,268.30, instead of its original amount of \$4,581.85."

Evidence was given by the bank tending to show that the original notes were paid off, and that the note for \$10,066.37 was given for a new loan and not as a renewal of the other loans. On the other hand, Thomas, one of the defendants, who was a director of the bank from 1863 until after the last-mentioned note was negotiated, testified that the new note was given as a renewal of the original loans. The plaintiff brought error.

Louis Lewton, for plaintiff in error. Section 30 of the National Banking Act creates a forfeiture, and hence must be strictly construed. *Bank of Canton v. Brainerd*, 8 Ohio, 292; *Hall v. State*, 20 Ohio, 8. The law applied the payments to the interest. *Miami Ex. Co. v. Bank U. S.*, 5 Ohio, 260; *Hammer v. Nevill*, Wright, 169; *Connecticut v. Jackson*, 1 Johns. Ch. 17; *Stoughton v. Lynch*, 2 id. 213; 1 Pick. 4.

J. M. Estep, for defendants in error.

OKEY, J. Three questions are presented. First, as to the amount legally due on the note; secondly, whether the court erred in excluding certain evidence; and thirdly, whether there is error in the judgment as to costs.

1. There is conflict in the evidence, but it is with respect to

immaterial matters. True, an officer of the bank testified: "We did not think of renewing any old debts. The question of the amount due on the old notes, or of renewing them, was not before us, or considered by the board at all. There was no agreement to renew but only to loan." But when the facts are considered, they fully support the finding that the real transaction was simply a renewal of usurious loans.

Where interest at a rate exceeding that allowed by law is retained or stipulated for, the contract is, under the laws of this State, invalid only as to the excess; while under the 30th section of the National Banking Act, "the statute operates on the instrument given for the loan, and, in effect, declares it to be invalid as to the entire interest, but valid and binding as an obligation for the payment of the principal." *First National Bank v. Garlinghouse*; *Shunk v. First National Bank*, 22 Ohio St. 492-502, 508; *Hade v. McVay*, 31 id. 231. But it has been decided that under the laws of this State, in an action on a note given in renewal, where the original note embraced illegal interest, the consideration may be inquired into, and the illegal interest deducted. *Baggs v. Loudenback*, 12 Ohio, 153. And see Tyler on Usury, ch. xxx. The same principle applies in cases arising under the National Banking Act (*Overholt v. National Bank*, 82 Penn. St. 490); though, as we have seen, in those cases the whole of the interest must be deducted.

Under some circumstances, no doubt, one note is regarded as merged in, or discharged or satisfied by another, so that no suit can be brought on the former; while in others, the right to sue on an original note is unaffected by the execution and delivery of another note, based on the same consideration. But the principle of those cases has no application here. The inquiry in this case is whether the real transaction was an extension of the time of payment of the original loans; and it is quite clear to us that it was. It is also clear, as matter of law, that none of the notes could bear interest, for the reason that their interest-bearing power was destroyed by the illegal agreement; and therefore payments made generally could only apply to the principal. The court below proceeded on that principle in ascertaining the amount due to the plaintiff, and hence the finding is correct. The case is wholly unlike *Shunk v. First National Bank*, 22 Ohio St. 516; and the cases in which payments, made generally, have been applied first to the payment of interest, have, for the reason stated, no application here.

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[Omitting the second point.]

Recurring in this connection to the defense, it is clear that Thomas, the principal in all the notes, was no more estopped from setting up the illegality, by reason of his position as director, than if he had not been officially connected with the bank. *Goudy v. Gebhart*, 1 Ohio St. 262. It is equally clear that, notwithstanding the unauthorized character of the loan, his contract to pay the principal may be enforced. *Gold Mining Co. v. National Bank*, 96 U. S. 640.

[Omitting a technical point.]

Judgment affirmed.

CITY OF AKRON V. CHAMBERLAIN COMPANY.

(34 Ohio St. 338.)

Municipal corporation — liability for damage to abutting owner by change of grade of street.

A municipal corporation is liable in damages to an abutting lot-owner for an injury to his land which has been improved with reference to grade in a street established under circumstances denoting its permanency; or where the street not being graded, the lot-owner improves his lot with reference to a reasonable grade subsequently to be established, and which being subsequently established, is thereafter changed to his detriment; but the reasonableness of the grade is to be determined by the circumstances existing at the time when it is established and not by those existing when the lot is improved.*

ACTION by the city of Akron against the Chamberlain Company and others, under the statute, to have the damages sustained by the defendants by reason of the improvement of a street assessed by a jury.

The defendant owned a flouring mill, on a lot abutting on the street, and the grade was elevated about 14 feet, in front of the mill. The mill had been erected in 1842, and the grade of the street was raised in 1876, under an ordinance passed in 1873. There was testimony that the mill had been erected before the grade of the street had been originally established, and that in 1844 the municipal authorities had established a grade suitable for the con-

*See *Fellowes v. City of New Haven* (44 Conn. 240); 26 Am. Rep. 447, and note, 457; *Hendershott v. City of Ottumwa* (46 Iowa 659); 26 Am. Rep. 182.

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venient use of the mill, and that the change of grade in 1876 resulted in injury to the mill. There was also testimony that no grade had been established in 1844, as claimed by the company. The jury assessed the company's damages at \$9,600, for which judgment was rendered, which was affirmed below.

S. Burke, for plaintiff in error.

R. P. Spalding, F. J. Dickman, W. H. Upson, and E. P. Green, for defendant in error.

MCLIVAIN, J. We adhere, with entire satisfaction, to the doctrines enunciated in *Cincinnati v. Penny*, 21 Ohio St. 499; s. c., 8 Am. Rep. 73, wherein the former cases decided by this court, in relation to the liability of municipal corporations for damages to adjacent proprietors, by reason of the improvement of streets, were approved.

In that case, while the liability of the municipality was acknowledged in cases where adjacent proprietors make improvements on the faith of corporate acts, whereby they are induced to believe that no future change in the street will be made, it was affirmed that such owners must improve, at their peril, where the wants of the public, as to the improvement of a street, have in no way been indicated or defined by the public authorities.

But inasmuch as the decision in the case of *Crawford v. Delaware*, 7 Ohio St. 459, was approved in *Cincinnati v. Penny*, it appears that some doubt has arisen as to the true rule. The doubt arises thus; a proposition in the syllabus of *Crawford's* case is: "That when a grade has not been established, the owner of a lot must use *reasonable care and judgment* in making improvements or erecting buildings with a view to a reasonable and proper grade, and the city will not be responsible for injuries to such improvements by afterward grading the street, if the grade by ordinary care could have been anticipated." This proposition must be true, if the lot-owner, in such case, improves at his peril. It is not on this proposition, however, that the doubt arises, but on a supposed implication, namely, that if the owner *uses reasonable care and judgment*, and is nevertheless injured by subsequent grading, the municipality will be responsible, although the grade subsequently established be a reasonable one. Such implication, if it arises, is of course repelled by the decision in *Cincinnati v. Penny*.

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But it does not necessarily arise, as will be seen by an examination of the case then before the court. The case was not one for the application of such a doctrine. We do not understand, however, that it was the intention of the court, or of the learned judge who wrote the opinion, to hold that the test of liability, in the supposed case, is the reasonableness of the care and judgment exercised by the lot-owner, instead of the reasonableness of the subsequent grade of the street. But however that may be, we are now unanimously of opinion that if the subsequent grade, in such case, be reasonable, or in other words, if it be established in the reasonable exercise of the authority conferred on the municipality, at the time it is made, then such grade should have been anticipated by the owner of the adjacent lot, and his improvements should have been made with reference thereto. Whatever latitude there may be in the exercise of discretion in fixing the grade of a street is lodged in the municipal authorities, and not in the adjacent lot-owners.

While we recognize the general rule to be, that no liability on the part of a municipality for injury to abutting property, by reason of the improvement of a street, exists where such improvement is properly made, yet this rule is subject, as we have seen, to the exception, that where abutting property is improved with reference to an existing street, so graded or improved under the authority of the public agents having the control thereof, as to indicate, fairly and reasonably, permanency in the character of the street improvement, a liability is cast upon the city or village for injuries resulting from subsequent changes.

And it would seem to follow, as a logical sequence that if, before a permanent grade is thus established, the owner of an abutting lot improves the same with reference to a reasonable grade to be established in the future, and his anticipations are realized in the subsequent establishment of the grade, he should thereafter, in respect to such improvement, be entitled to enjoy the same right in the grade of the street which was thus fairly and reasonably anticipated, as if he had improved his lot after the grade had been so established. Surely the rights of such a lot-owner are equal to those of one who improves his lot after the grade was established.

But while we find the doctrine of liability on the part of the municipality, as maintained in this State, fairly stated in the charge of the probate court, we think the rule of non-liability was not

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well or clearly put to the jury ; especially in a case where abutting lots are improved before the grade of the street has been established, and the buildings thereon are afterward injured by a *reasonable* grade subsequently established.

We have had some difficulty in determining the sense, in some instances, in which the words "grade" and "grade established" were used, in the charge of the court below. But without referring to instances more particularly, it is enough to say, that we are of opinion that the establishment of a grade whereby lot-owners are justified in assuming that no change will be made in the grade of a street, and may therefore improve their lots with reference to its present condition, so that the municipality will be liable for injuries to their improvements, resulting from a subsequent change of the grade, does not necessarily require the passage of an ordinance or other legislative action ; but it may be shown, by the nature of the improvement on the surface of the street, under the direction or sanction of the proper authorities, whether in accordance with an ordained grade line or not ; but otherwise, if the surface improvement indicates a mere temporary use or condition of the street.

The plaintiff in error requested the court to charge as follows :

"There being no claims made by the claimant of damages in this case that any part of their lands have been taken, and damages being claimed solely on account of a change of grade, the plaintiff cannot recover damages for injury to any part of their property built upon, unless such buildings were built after a grade was actually established by the town or city authorities, in accordance with such grade, or that such buildings, if constructed before a grade was established, were constructed with reference to a *reasonable* grade, and that the city by establishing an *unreasonable* grade has caused the injury complained of."

While this request might properly have been refused, on the ground that it omitted the case where a *reasonable* grade, which had been afterward established, was anticipated by the claimant of damages, it was nevertheless given, with this qualification :

"I give you this as law, except the concluding paragraph, that the city, by establishing an *unreasonable* grade, has caused the injury complained of. I say to you that it is not necessary for you to find that the present grade is an *unreasonable* one, for the present time, in order that the plaintiff may recover."

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This qualification was calculated to mislead the jury, in respect to the risk which the owner assumed in improving his lot before the grade of the street was established. He was bound to anticipate the future grade of the street, in accordance with the future wants of the public. The question is not, what would have been a reasonable grade at the time the lot was improved, but, was the first grade, indicating permanency, reasonable at the time it was established? The liability of the municipality would attach only when such grade was unreasonable, or if reasonable, by subsequently changing it, to the injury of adjacent buildings.

The plaintiff in error also requested the court to charge as follows :

"The law presumes and the jury will presume that the grade established and the acts done by the city council were legally established and done, and that the grade established and improvement made were reasonable, until the contrary appears ;" which request was given, the court adding thereto the following charge : "That what was a reasonable grade in 1873 might not have been a reasonable grade in 1844. What would be a reasonable grade in a village of two thousand inhabitants might not be a reasonable grade for a city of fifteen thousand inhabitants. If the plaintiff built, in 1842, in reference to what would have been a reasonable grade then, and such grade was established, his right to recover would not be determined by the fact that the present grade is or is not an unreasonable one."

Admitting the last clause of this instruction to be a correct statement of the law, we think the whole instruction was misleading. Suppose that "what would have been a reasonable grade" in 1842, had not been afterward established, and the jury had found the grade of 1873 to be the first grade established, then they might well have understood, from this instruction, that the city was liable, if they further found that the grade of 1873 would have been unreasonable in 1842. And thus the abutting proprietor would be relieved from the risk of anticipating a future reasonable grade, under the general rule, without bringing himself within the exception which has been recognized in this State.

Judgment reversed and cause remanded.

WHEELER V. THE STATE.

(34 Ohio St. 394.)

Criminal law — evidence — insanity — inquisition of lunacy.

On the trial of an indictment, the defendant relied on insanity as a defense, and offered in evidence a record from the probate court showing that four years previous to the commission of the alleged crime an inquest had been held in that court, and that he had been adjudged insane and confined in an asylum. *Held*, that the evidence was admissible.

CONVICTION of burglary and larceny, alleged to have been committed in March, 1878. On the trial the defendant relied on insanity as a defense and offered in evidence an authenticated transcript of a record of a probate court. The record consisted of an affidavit, made December 5, 1874, that the defendant was then insane; the certificate of a physician, to the same effect, and giving a detailed statement of the case; the order of the probate court, made the same day, reciting that an inquest of lunacy had been held by the probate court on the same day concerning the defendant; that having heard the testimony of witnesses, and being fully advised in the premises, the court found that he was then insane, and a proper person to be admitted into the insane asylum at Dayton, and that his insanity was of two years' duration. It further appeared from the record that the defendant had been conveyed to the asylum, in pursuance of the order, and delivered to the superintendent. On objection the record was excluded.

Cunningham & Brotherton, for plaintiff in error.

Isaiah Pillars, attorney-general, and *H. S. Prophet*, prosecuting attorney, for the State.

OKEY, J. Under the territorial government, jurisdiction to hold inquests concerning persons alleged to be insane was vested in the judge of probate. 1 Chase, 127, 191, 339. By the act of 1805, the jurisdiction was vested in the Court of Common Pleas. 1 Chase, 439. In 1815 it was transferred to justices of the peace (2 Chase, 869), where it remained, except as to non-residents (2 Chase, 1009), until 1838, when it was vested in the associate judges. 1 Curwen, 407.

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In the proceeding under all these statutes, the question of sanity was tried by a jury, consisting, in some instances, of five men; in others of seven men; and in still others of twelve men. It was analogous to a commission in the English practice and the practice of many States.

In 1850 the ancient feature of the proceeding—the determination of the question by a jury—ceased to exist in this State; but the effect of the adjudication remained the same. By a statute passed in that year, the power to hold such inquests was vested in two justices of the peace. They were required to hear evidence, and set forth in writing whether the person complained of was sane or insane, and the history of the case as developed in the evidence. 2 Curwen, 1554.

While the act of 1850 was in force, jurisdiction was conferred by the act of 1852 (3 Curwen, 1717) on the probate court “in inquests as to lunatics, insane persons, and idiots;” and by the probate code of 1853 (3 Curwen, 2041), re-enacted in 1854 (4 Curwen, 2630), exclusive jurisdiction was conferred on that court “to make inquests respecting lunatics, insane persons, idiots, and deaf and dumb persons, subject by law to guardianship.”

The act of 1850 was repealed in 1856 (4 Curwen, 2740), and the latter act remained in force, except as modified by other acts (see 67 Ohio L. 43), until 1878, when it was repealed and re-enacted. 75 Ohio L. 64.

The act of 1856 provided that before any person can be admitted into an insane asylum, the judge of the probate court “shall proceed to examine the witnesses in attendance, and if, upon hearing of the testimony, such judge shall be satisfied that the person so charged is insane,” proper steps shall be taken for his admission to such asylum. The finding, it will be seen, was in effect the same as where a guardian was appointed. §§ 41, 63. It was an adjudication concerning the *status* of a person by a court clothed with jurisdiction, and, except as otherwise provided by statute, the record imported absolute verity that he was then a proper person to be confined in an insane asylum. *Shroyer v. Richmond*, 16 Ohio St. 455. And while the proceeding in this State differs from an inquisition of lunacy in the English practice and in the practice of many States (Shelford on Lunatics, ch. 4; 2 Barbour's Ch. Pr., book 5, ch. 6), the effect of the inquest, as to the matter now before us, is the same.

Inquisitions of this sort have been admitted in evidence in numerous cases, some of which were between private parties, and others concerned the public. 1 Greenl. Ev., § 356; 2 id., § 371; Freeman on Judgments, § 606; *Banker v. Banker*, 63 N. Y. 400; *McGinnis v. Com.*, 74 Penn. St. 245; *Lancaster Co. Nat. Bank v. Moore*, 78 id. 407; s. c., 21 Am. Rep. 24. In 2 Phillipps' Ev. *266, it is said: "An inquisition of lunacy is evidence on the trial of an indictment to show that the prisoner was insane when he committed the offense." To the same effect is Shars. Stark. Ev. 407*; Shelford on Lunatics, 74.

Inquests of this character are analogous to proceedings *in rem*, affecting the general and public interest, and no one can strictly be regarded as a stranger to them. And such condition of things as the insanity of a party being shown, there is a presumption of more or less force, according to circumstances, that the same condition continued. Nor does the time which may have elapsed since the inquest was held affect the question of its admissibility; *Sergeant v. Sealey*, 2 Atk. 412, though of course it may have great force on the question of the weight of the evidence.

Ordinarily, such inquisitions are not conclusive, but only *prima facie* evidence of incapacity, as will be seen from the authorities cited; but on a question like that in issue here, it is manifest they cannot be regarded as even *prima facie* evidence. A person who is a fit subject for confinement in an insane asylum does not necessarily have immunity from punishment for crime; and the length of time between confinement in the asylum and the commission of the act charged, the nature of the crime and other facts, may render such inquisition of little weight as evidence; but its weight is for the jury in each case.

The only criminal case cited by Phillips, in support of the passage quoted from his work, is *Rex v. Bowler*. That was a case tried before GIBBS, C. J., and LE BLANC, J., at Old Bailey, in June, 1812. It is fully stated in 3 Stark. Ev., pt. 4, 1704*, and Shelford on Lunatics, 590. An inquest of lunacy was offered and admitted; but the defendant was convicted and executed, and it is manifest, from the reports of the case, that the record was admitted as evidence merely tending to prove insanity.

Leggate v. Clark, 111 Mass. 308, is supposed to be an authority against the competency of the evidence. In that case it appears that the proceedings of the judge of probate, committing Leggate

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to an insane hospital, were admitted in an action involving the validity of a deed which he had executed, as *prima facie* evidence of insanity. The Supreme Court reversed the judgment, on the ground, that while the record of a proceeding for the appointment of a guardian for an insane person would be admissible in such a case, the order in question was not admissible, as it "is not designed to fix his *status*." But as we have seen, a probate judge in this State is required to make, on hearing, precisely such an adjudication as is proper and sufficient in case of the appointment of a guardian, and hence the adjudication determines, to this extent, the *status* of such person.

In that case some stress is placed on a provision in the statute, requiring notice to the supposed lunatic. In England, where there is the right to traverse, it seems notice is not required, though Mr. Shelford remarks: "It seems extraordinary that such a rule as this should still prevail," Shelford on Lun. 131 (v.) But in this country, notice to the supposed lunatic in some form has been generally regarded as indispensable, with whatever view the inquest may be held; and it has been said that "the benignant principles of the common law would require the notice to be given." *Allis v. Morton*, 4 Gray, 63; *Matter of Tracy*, 1 Pai. 580; *Matter of Petit*, 2 id. 174; *Matter of Russell*, 1 Barb. Ch. 38; *Lackey v. Lackey*, 8 B. Monr. 107. I do not see why the finding would be any the less in the nature of an adjudication *in rem*, from the mere fact that notice is expressly provided for. But the court was simply giving a construction to the statutes of that State, with the provisions of which I am not very familiar, and doubtless the decision rests on satisfactory grounds.

Our attention has been called to the fact that in *State v. Turner, Wright*, 20, a coroner's inquest offered by the State was excluded. We have no doubt the decision was correct for the reason given and others. A coroner's inquest with us is of such a nature that to admit it against the objection of the accused would violate that clause of the bill of rights which entitles him to meet the witnesses face to face. The decision in no way affects the question in this case.

Insanity seems to be a defense amply provided for by statute in this State. It may be relied on before indictment, by one charged with crime, after indictment and before trial on the merits, and on the final trial. 74 Ohio L. 87, 103. In this day, when the tend-

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ency is to admit rather than exclude testimony, we should hold this evidence admissible if the question could be regarded as doubtful; but its competency rests on substantial grounds. The inquest may have been held in another State, or other facts may render it difficult to produce the oral testimony. Persons who are not to some extent deranged are rarely sent to an asylum. The danger that the evidence will have undue weight is small. The *fact* that the accused was confined in an asylum is confessedly competent evidence in his favor; and he may offer proof of the insanity of his kindred. In *Blackburn v. State*, 23 Ohio St. 146, where it was claimed that the deceased came to her death by suicide, this court held that evidence to show that six years previous to her death she was of a melancholy condition of mind, and predisposed to, and threatened to commit suicide, was competent. Does not the evidence offered in this case rest on even more satisfactory ground? However that may be, we think the evidence offered and excluded was competent, as tending to prove the defense relied on. The physician's certificate could not properly be admitted, but the bill of exceptions, fairly construed, discloses only an offer of the adjudication, showing that on December 5, 1874, Wheeler was so far insane as to be a proper subject for confinement in an insane asylum, and the official return showing his actual confinement.

Judgment reversed, and cause remanded for a new trial.

Judgment reversed.

TIMMONS V. THE STATE.

(34 Ohio St. 426.)

Criminal law — burglary — opening transom.

Pushing open a closed but unfastened transom, that swings horizontally on hinges over an outer door of a dwelling-house, and entering thereat, constitutes burglary.*

CONVICTION of burglary. It appeared that the prisoner had entered the premises through a transom over the outer door, which transom swung on its hinges like an ordinary door, and was closed but not fastened.

*See *Johnston v. Commonwealth* (85 Penn. St. 54), 27 Am. Rep. 622.

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The court charged: "That if the jury was satisfied, beyond a reasonable doubt, as to all the other elements necessary to constitute a burglary (which were explained) except a *breaking*, and found that the said transom was closed on the night in question, though not fastened, and that the prisoner used sufficient force to push it from its place, so that it would swing open, that *that* was a sufficient breaking in law, and that their verdict under these circumstances, if satisfied beyond a reasonable doubt, should be guilty."

F. M. Coppock, for plaintiff in error, cited *Rex v. Russell*, 1 M. C. C. 377; *Rex v. Hewitt*, R. & R. 157; *Rex v. Hyames*, 33 Eng. C. L. 577; *Rex v. Haines*, R. & R. C. C. 451; *Rex v. Hall*, R. & R. 355; Hale's Pl. Cr. (1st Am. ed., by Stokes & Ingersoll), 552, 557; *Comm. v. Stephenson*, 8 Pick. 354; *People v. Hubbard*, 24 Wend. 369; *State v. Wilson*, Cox, 439; *State v. Boon*, 13 Ired. 244; *Frank v. State*, 39 Miss. 705; *People v. Bush*, 3 Park. Cr. 552; *Dennis v. People*, 27 Mich. 151.

S. H. Drew, prosecuting attorney, for defendant in error.

GILMORE, J. It is contended in argument by counsel for plaintiff in error, that there is, in this case, an element of negligence on the part of the owner of the house entered, which under the circumstances disclosed in the record rendered the offense charged a trespass and not a burglary.

The law on the point is, that if the owner leaves his doors open, or partly open, or his windows raised, or partly raised and unfastened, it will be such negligence or folly on his part as is calculated to induce or tempt a stranger to enter; and if he does so through the open door or window, or by pushing open the partly opened door, or further raising the window that is a little up, it will not be burglary. 4 Bl. Com. 226; *Com. v. Stephenson*, 8 Pick. 354.*

But we do not see how this doctrine can have any application here. The testimony tended to prove that in this case the house was securely fastened in every respect, except as to the transom in question, and that it was closed. There is in this no evidence of such negligence on the part of the owner as could have induced or tempted the prisoner to enter. Nor are we at liberty to adopt the suggestion of counsel that the transom, after being closed, may

*To same effect, *Commonwealth v. Strumpey* (105 Mass. 568), 7 Am. Rep. 556.

have been opened by currents of air within or without, or by other sufficient causes, and that the prisoner may thus have been tempted to enter through the open transom, for the jury found that the transom was closed till it was pushed open by the prisoner. There was therefore no such negligence on the part of the owner of the house as affects the question in this case in any way.

This brings us to the only question in the case. Did the court err in charging the jury that if the transom was closed, though not fastened, and the prisoner used sufficient force to push it from its place, so that it would swing open, that *that* was a sufficient breaking in law?

Our statute defining burglary provides: "Whoever, in the night season, maliciously and *forcibly* breaks and enters any dwelling-house," etc. The word *forcibly* is not used in the common-law definition, in which the words are "*break and enter.*" But in our statute the word *forcibly* only expresses the degree of force that was implied at common law from the word *break*. Hence, under statute, as at common law, there may be a constructive forcible breaking, as where an entrance is obtained by trickery or deception. *Ducher v. State*, 18 Ohio, 308.

We may therefore look to the principles of the common law in determining what will constitute a forcible breaking under our statute.

In England, for more than two hundred years it has been settled that there can be no burglary without an actual breaking. And in Sir Matthew Hale's time (1 Hale's P. C. 552) these acts amounted to an actual breaking, viz.: "Opening the casement, or breaking the glass window, picking open a lock of a door with a false key, or putting back the lock with a knife or dagger, unlatching the door that is only latched, and to put back the leaf of a window with a dagger," etc.

In *Brown's* case, decided in 1799 (2 East's P. C. 489), there was an aperture communicating with an upper floor, which was closed by folding doors with hinges, which fell over it and remained closed by their own weight, but without any interior fastening, so that those beneath could push them open at their pleasure by a moderate exertion of strength. It was held that the pushing open of these folding doors was sufficient to constitute a breaking.

And it has subsequently been held (1 Moody's C. C. 377) that the lifting of a flap of a cellar, usually kept down by its own weight,

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is a sufficient breaking for the purpose of burglary. And in *Rex v. Hall*, 2 R. & R. C. C. 355, it is held that where a window opens upon hinges, and is fastened by a wedge, so that pushing against it will open it, forcing it open by pushing against it is sufficient to constitute a breaking. And in *Rex v. Haines*, id. 450, it is decided that the pulling down of the sash of a window is a breaking, though it has no fastening and is only kept in its place by the pulley-weight; it is equally a breaking although there is an outer shutter which is not put to. In *Rex v. Hyams*, 7 C. & P. 441, it is held that raising a window which is shut down close, but not fastened, though it has a hasp which might have been fastened, is a breaking of a dwelling-house.

These authorities clearly show that only a slight degree of force is necessary to constitute a burglarious breaking at common law.

The following American cases are to the same effect as *Rex v. Hyams*, above cited. *State v. Boon*, 13 Ired. 244; *Frank v. State*, 39 Misa. 705; *People v. Edwards*, 1 Wheeler's Cr. C. 371.

The principle as laid down in the cases above cited in 2 East and 1 Moody's C. C., as to the cellar or flap doors kept down by their own weight, is followed in the case of *Dennis v. People*, 27 Mich. 151, where it is held that an entry into a building by raising a transom window attached by hinges above, and arranged to fall into the frame by its own weight, when the window was shut into the frame, so as to require some force to open it, is a sufficient breaking under the statute of that State punishing the breaking and entering an office, shop, etc., in the night time.

No court or text writer has undertaken to define the exact degree of force that is necessary to constitute a breaking in burglary; nor indeed would it be practicable to do so. The law on the subject is found in decided cases in which it is announced in connection with a given state of facts, to which it is applied; and in that way, reasonable certainty has been attained as to what facts will or will not in most cases constitute a burglarious breaking. But there are cases in which the facts are of such a character as to render it difficult to determine whether in law they constitute a burglary or a trespass.

But from the cases above cited, it is plainly the law that where no force is used, as in entering through an open door or window, there is no breaking, and hence only a trespass.

On the other hand, where only slight force is used, as where a

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flap door or a window is closed down and kept in place only by its own weight, the force that is necessary to vertically raise it so as to effect an entrance is sufficient to constitute a burglarious breaking.

There may exist an appreciable difference between the force that would be required to vertically raise a window that was closed and held down by its weight, and that which would be required to push open a closed but unfastened transom, that swings back horizontally on hinges, as in the case before us; and admitting there is such a difference, the question is whether the force required to accomplish the latter is sufficient to constitute a burglarious breaking? We think an affirmative answer may safely be given.

The application of the law does not depend upon the degree of the force used, but upon the fact that force of *some* degree, however slight, was used. The force required to push open the transom in question was undoubtedly slight, but still it must have been an appreciable force, sufficient to overcome the friction of the hinges, occasioned by the weight of the transom, and this, under the circumstances, is all that the law requires.

The case of *State v. Reid*, 20 Iowa, 413, is in point. It is there decided that "the pushing open of a closed door, with the intent expressed in the statute, is a sufficient breaking, within the meaning of the law, to constitute burglary."

We find no error in the charge of the court, under which the jury had to find that the transom was pushed from its place, which implies some degree of force before they could find the prisoner guilty; and this finding is not before us for review on the evidence.

Motion overruled.

UNITED STATES ROLLING STOCK COMPANY V. ATLANTIC AND
GREAT WESTERN RAILROAD COMPANY.

(34 Ohio St. 480.)

Agency — double — waiver of objection by laches of principal.

The plaintiff and defendant, by their respective boards of directors, entered into a contract whereby the plaintiff agreed to supply the defendant with all the rolling stock required in the operation of its railway for the period of seven years, at an agreed rental to be paid monthly. The five persons

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composing the plaintiff's board of directors were members of the defendant's board, which consisted of thirteen persons. At the meeting of the defendant's board, at which the terms of said contract were agreed upon and confirmed, there were present only eight directors, two of whom were directors of the plaintiff. The plaintiff supplied the rolling stock as agreed, and the defendant received and used the same in the operation of its railway for the period of nearly two years and a half, when the contract was terminated. *Held*, if it be assumed that the contract, under the circumstances of the case, was voidable, in equity, at the election of the defendant within a reasonable time after the same was made, for want of a quorum of directors of the plaintiff at the meeting at which the contract was agreed upon and confirmed the delay in exercising the election to avoid it operated as a waiver of the right so to do; and, consequently, an instruction to the jury that such right existed at the time of the trial was erroneous.

ACTION on contract to recover a balance for the use of rolling stock from June, 1872, to December, 1874. The plaintiff was incorporated under the laws of New York with a board of five directors; and subsequently, the defendant was organized under the laws of New York, Pennsylvania and Ohio with a board of thirteen directors; the five directors of the rolling stock company being elected and becoming five of the thirteen directors of the railroad company at the time of its organization, and continuing the sole members of the plaintiff's board of directors and five of the thirteen members of the defendant's board until the 11th day of December, 1873, and one or more of the directors of the plaintiff continuing to be directors of defendant until the termination of the contract.

On November 6, 1871, a provisional contract was entered into by persons acting for both parties, and on the 19th day of July, 1872, this contract, with a certain modification, was ratified and adopted by the plaintiff's board of directors, and on August 2, 1872, was, as modified, adopted and confirmed by the defendant's board of directors. At the meeting of the defendant's board, at which the contract was ratified and confirmed, only eight of the thirteen members were present, two of whom were directors of the plaintiff.

The court, at defendant's request, charged the jury "that the fact that the said five directors or trustees of plaintiff were five of the thirteen directors of defendant, with the further fact that the aforesaid two directors or trustees of plaintiff were two of the quorum of eight directors of defendant who passed said resolution of August 2, 1872, rendered the written or special contract made

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between plaintiff and defendant as aforesaid in law invalid and voidable at the election of defendant, irrespective of the motives of the said directors of plaintiff and defendant respectively, in their aforesaid action."

The plaintiff had judgment only for the fair rental value of the stock.

Charles M. DaCosta, Stanley Matthews, Edward Bissell, Edward Oviatt, and Bissell & Gorrill, for plaintiff in error.

Otis, Adams & Russell, W. H. Upson, and R. P. Ranney, for defendant in error. Directors of corporations cannot, as directors, represent both sides of a contract, in which the two corporations have conflicting interests, especially when the contract is made in the interest of one at the expense of the other.

The same person cannot represent, as agent or trustee, both sides of any controversy. He cannot act for both sides in negotiating a contract, much less in making a contract between adverse interests. *Building Ass'n v. Caldwell*, 25 Md. 420; *Sparling v. Todd*, 27 Ohio St. 521; Story on Agency, §§ 210, 211.

Directors in a corporation are agents and trustees for the stockholders or parties in interest, and occupy a fiduciary position toward them. *Goodin v. Railroad*, 18 Ohio St. 182; *Port v. Russell*, 36 Ind. 66, and cases there cited; *Paine v. R. R. Co.*, 31 id. 288; *Flint & P. M. Ry. Co. v. Dewey*, 14 Mich. 477; *Green's Brice's Ultra Vires*, 400-403, and notes; *Perry on Trusts* (2d ed.), 248, § 207; *Railroad v. Blakie*, 1 McQueen, 461; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Lewin on Trusts*, 97; *Law Lib.* 402; *Ex parte Hughes*, 6 Ves. 622; *Ex parte Lacey*, id. 628; *Ex parte James*, 8 id. 337; *Railway v. Dewey*, 14 Mich. 477; *People v. Tp. Board*, 11 Ill. 225; *Brewer v. Boston Theater*, 104 Mass. 378; *Preston v. Grand C. D. Co.*, 11 Sim. 327; *Hodgkinson v. Insurance Co.*, 26 Beav. 473; *Gregory v. Patchett*, 33 id. 595; *Atwool v. Merryweather*, L. R., 5 Eq. 464.

BOYNTON, J. The question presented by the record arises upon the exception to the charge of the court upon the point of the defendant's right to avoid the contract upon which the action was founded. The rule that an agent or trustee in matters touching his agency, or pertaining to the trust, cannot bind the principal or *cestui que trust* without his consent, by a contract in which the

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former is adversely interested, rests upon a very satisfactory foundation, and is supported by a great weight of authority. *Wade v. Pettibone*, 11 Ohio, 57; *Morison v. Thompson*, L. R., 9 Q. B. 480; 1 Lead. Cas. in Eq. 210.

In *Story on Agency*, § 210, the rule is said to be founded "upon the plain and obvious consideration, that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence, and zeal of the agent for his own exclusive benefit. It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interest of his principal as far as he lawfully may." And, in 2 Kent's Com. 618, the same principle is asserted, in the following language: "An agent, acting as such, cannot take upon himself, at the same time, an incompatible duty. He cannot have an adverse interest or employment. He cannot be both buyer and seller; for this would expose his fiduciary trust to abuse and fraud." In *Bennett, Ex parte*, 10 Ves. 393, Lord ELDON, commenting on a sale of the trust property to the trustee, stated the reason of the rule denying the right of the trustee to buy the trust property to be, "that it would not be safe, with reference to the administration of justice in the general affairs of the trust, that a trustee should be permitted to purchase; for human infirmity will, in very few instances, permit a man to exert against himself that providence which a vendor ought to exert, in order to sell to the best advantage, and which a purchaser is at liberty to exert for himself, in order to purchase at the lowest price." The rule which prevents the agent or trustee from acting for himself in a matter where his interest would conflict with his duty, also prevents him from acting for another whose interest is adverse to that of the principal; and in all cases, where without the assent of the principal, the agent has assumed to act in such double capacity, the principal may avoid the transaction, at his election. No question of its fairness or unfairness can be raised. The law holds it constructively fraudulent, and voidable at the election of the principal. *Aberdeen Ry. Co. v. Blackie*, 1 McQueen's H. L. Cas. 461; *York Buildings Co. v. Mackenzie*, 3 Paton's H. L. 378; Bispham's Principles of Eq. 106; 18 Ohio St. 182.

But does the present case fall within the operation of this principle? The right to avoid the contract, because the agent has a personal interest in its subject-matter adverse to that of the principal, or has assumed an incompatible duty, is one arising in equity for

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the principal's protection. He may avail himself of the right to avoid the contract, or he may waive it, at his option.

That the agent may represent two persons, with their assent, in a transaction relating to or embracing a subject-matter respecting which their interests may be adverse or conflicting, admits of no doubt. In *Adams Mining Co. v. Senter*, 26 Mich. 73, upon the question how far the double agency of one affected his relation to his employers or third persons, it was held, that "where the same person is made the agent of two mining corporations, in the same vicinity, and it becomes necessary for one to deal with the other, he must be presumed to have the same power to act for both that would be possessed if there were two agents acting separately, and may dispose of property in the same way; and such double authority would dispense with such formalities as could not be complied with, where one man acts for both companies." The court, in announcing its opinion, says: "The authority of agents, where no law is violated, is as large as their employers choose to make it. There are multitudes of cases where the same person acts under power from different principals in their mutual transactions. Every partnership involves such double relation. Every survey of boundaries by a surveyor jointly agreed upon would come within similar difficulties. There can be no presumption that the agent of two parties will deal unfairly with either." So, where subsequent assent is given to the acts of the agent, the same result follows; that is, if the principal, with full knowledge of all the facts affecting his rights, ratifies the act of the agent, the right to avoid the contract or transaction is gone.

In discussing the subject of the principal's right to avoid or rescind the contract, where the engagements of the agent are affected with a personal interest, Story in his *Commentary on the Law of Agency*, § 310, further says: "Of course it is to be understood, as a proper qualification of the doctrine, that the principal has an election to adopt the act of the agent or not; and that if after a full knowledge of all the circumstances, he deliberately and freely ratifies the act of the agent, or acquiesces in it for a great length of time, it will become obligatory upon him, not by its own inherent force, but from the consideration that he thereby waives the protection intended by the law for his own interests, and deals with his agent, *quoad hoc*, discharged of his agency."

Mr. Wharton, in his work on *Agency*, § 244, says: "So, also, a

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principal, when fully knowing the facts, can ratify the agent's action, though tainted with employment by an opposing party."

The doctrine is equally well settled that the option to avoid the contract must be exercised by the principal within a reasonable time after being fully apprised of the circumstances of the agent's engagement.

"Where the principal is informed of what has been done, he must dissent, and give notice of it within a reasonable time; and if he does not, his assent and ratification will be presumed." 2 Kent's Com. 616; Paley on Agency, 172.

What constitutes a reasonable time must largely, if not wholly, depend on the circumstances of the particular case. Where the consequences of delay are or may prove injurious to the other contracting party, especially where large expenditures, to the knowledge of the principal, are being made, on the faith of the validity of the contract, the law requires prompt action on his part, if he would avoid responsibility for the acts of the agent. His right to avoid, being one arising in equity, is governed by the rules upon which that court administers justice. He must speak when he should, or he will not be permitted to speak when he would. In *Smith v. Clay*, 3 Bro. C. C. 639 (n.), Lord CAMDEN, adverting to the principles which govern a court of equity, where a party has slept upon his rights, said: "A court of equity has always refused its aid to stale demands, where a party has slept on his right, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced."

This doctrine is universally recognized by courts of equity. *Sanderson v. Etna Iron & Nail Co.*, ante, 442; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Grymes v. Sanders*, 93 id. 55; *Brown v. County of Buena Vista*, 95 id. 157; *Clegg v. Edmondson*, 8 De Gex, M. & G. 787; *Jennings v. Broughton*, 5 id. 126; *Murray v. Graham*, 6 Pai. 622; 2 Story's Eq. Jur., § 1520, a.

Hence, where the principal has an option to avoid or stand by the contract of his agent, he is not permitted to await the issue of events to transpire in the future, with the purpose of adopting the contract if the transaction to which it relates proves a paying one, and if not to reject it. Mere silence has often been held to give rise to a conclusive presumption of ratification, especially where

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good faith and fair dealing require the principal to speak, and his silence has a tendency to mislead. Story on Agency, § 255.

It is equally true, and results from the application of the same principle, that if the principal adopts a part of the act of the agent, upon full knowledge of the circumstances, he thereby ratifies the whole. He cannot elect to take a part and reject the balance. An acceptance of the benefits of the transaction imposes the obligation to assume its burdens and operates to confirm it as a whole. And a ratification once made becomes as irrevocable, obligatory, and binding as if the act of the agent were previously authorized.

In the light of these principles let us examine the question arising upon the charge of the court below.

If the contract sued on was void, because agents in common of the two corporations participated in making it, it of course would follow that no prejudice resulted from the instructions given. But a contract between two corporations having common directors, made by their respective boards, or between a corporation and an individual director or a firm of which he is a member, is at common law perfectly valid. In view of this fact, and to guard against the evils which, in particular instances, might result therefrom, it was provided in England by 8 and 9 Vict., ch. 16, that "no person holding an office or place of trust or profit under the company, or interested in any contract with the company, shall be capable of being a director; and no director * * * shall be capable of being interested in any contract with the company, during the time he shall be a director;" and also, that "if any director at any time subsequently to his election, * * * be either directly or indirectly concerned in any contract with the company, or participate in any manner in the profits of any work to be done for the company, the office of such director shall become vacant, and thenceforth he shall cease from voting or acting as a director." In *Foster v. Oxford, W. & W. Ry. Co.*, 13 C. B. 200, it was held, that while these provisions incapacitated a party contracting with a company from becoming or continuing a director, they did not avoid the contract. The action was brought upon an agreement between the defendant and a firm of which a director of the defendant was a member, to recover for a supply of iron to the company by the firm. In disposing of the point taken that the contract was void under the foregoing provisions of the statute, JERVIS, C. J., said: "If all such contracts are void, contracts entered into with a joint-

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stock company, as well as contracts entered into with individuals, would be avoided, if a member of the joint-stock company happened to be a director of the company contracted with ; and yet the 87th section merely provides, that 'no person being a shareholder or member of any incorporated joint-stock company shall be disqualified or prevented from acting as a director, by reason of any contract entered into between such joint-stock company and the company incorporated by the special act ; but no such director being a shareholder or member of such joint-stock company shall vote on any question as to any contract with such joint-stock company.' That provision would have been unnecessary if the contract was already avoided."

To the same effect is *Ernest v. Nichols*, 6 H. L. Cas. 401. There the 29th section of the 7 and 8 Vict., ch. 110, was construed to render a contract void for non-compliance with its provisions. That section in terms prohibited a director from voting on the subject of any contract in which he was interested. Then followed the provision that if any contract or dealing, with certain named exceptions, "shall be entered into, in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders, to be summoned for that purpose, and no such contract shall have force until approved and confirmed by the majority of votes of the shareholders present at such meeting." See, also, *Murray's Ex'rs* case, 5 De Gex, M. & G. 746.

These citations sufficiently show that in England a contract between a corporation and one of its directors would, in the absence of a statute affecting its validity, be upheld and enforced in her common-law tribunals. That the same rule prevails in this country is well established. See *Ashurst's Appeal*, 60 Penn. St. 290; *Stark Bank v. U. S. Pottery Co.*, 34 Vt. 144.

If it be granted that the confirmation of the contract by the defendant's board of directors at the meeting of August 2, 1872, was voidable in equity, at the election of the company, for want of the presence at that meeting of the board of a quorum of directors who were not directors of the plaintiff, it nevertheless appears that the board was composed of thirteen persons, a clear majority of whom were affected with no incapacity to act for the best interests of the company, and who sustained no fiduciary relation to the plaintiff whatever. This majority possessed ample power to restrain and

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control the action of the minority, and if the contract was voidable at the option of the company, it had full power to express the company's election if it saw fit to avoid the contract. The fact that some of the persons composing this majority might vote with those who were members of both boards, and thereby create a majority in favor of the contract, would in no wise affect the validity of the transaction, nor relieve the board from the duty to move in the matter, if they desired the company's escape from liability.

We have not, upon the most diligent research, been able to find a case holding a contract made between two corporations by their respective boards of directors invalid, or voidable at the election of one of the parties thereto, from the mere circumstance that a minority of its board of directors are also directors of the other company. Nor do we think such a rule ought to be adopted. There is no just reason, where a quorum of directors, sustaining no relation of trust or duty to the other corporation, are present, participating in the action of the board, why such action should not be binding upon the company, in the absence of such fraud as would lead a court of equity to undo or set aside the transaction. If the mere fact that a minority of one board are members of the other, gives the company an option to avoid the contract without respect to its fairness, the same result would follow where such minority consisted of but one person, and notwithstanding the board might consist of twenty or more. In our judgment, where a majority of the board are not adversely interested, and have no adverse employment, the right to avoid the contract or transaction does not exist without proof of fraud or unfairness; and hence the fact that five of the defendant's board of directors were members of the plaintiff's board, whatever may have been its effect on the defendant's right to disaffirm or repudiate the contract, if exercised within a reasonable time, did not disable the defendant from subsequently affirming the contract, if satisfied with its terms, or rejecting it if not; nor did it relieve it from the duty to exercise its election to avoid or rescind within a reasonable time, if not willing to abide by its terms.

That it did not do this, nor take any steps toward its disaffirmance, but continued to act under it for nearly two years and a half, receiving the rolling stock for the use of which it stipulated, and with which it operated its road for the whole of said period, making payments for such use in accordance with the rate fixed by the

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contract, very clearly appears from the admitted facts. Besides this, the petition avers, that upon an account stated of the amount due under the contract, on February 28, 1874, over eighteen months after the contract was entered into, and after ample time to elect to avoid if the company desired so to do, the defendant promised to pay the same, being in amount upwards of \$300,000. This allegation the answer nowhere denies; nor does it deny the allegation of the petition that said rolling stock was furnished and *received* and *used* under such contract for the whole of said period of time.

The denial that the contract set up in the petition "is or should be in any manner binding upon the company," and the allegation that the defendant is "not liable, except for the fair and reasonable value of the use of said rolling stock," are but the averment of mere legal conclusions, entirely out of place in a pleading, and of no possible benefit to the pleader. This court has repeatedly held that both allegations and denials of this character are without any legal significance whatever. *Knox County Bank v. Lloyd's Adm'r*, 18 Ohio St. 353; *Larimore v. Wells*, 29 id. 13; *B. & O. R. R. Co. v. Wilson*, 31 id. 555. Hence the conceded facts clearly establish a ratification of the contract, and estop the defendant from denying its validity.

The instruction given by the court to the jury, as applied to the undisputed facts, was therefore erroneous. The jury were told that the fact that the said five directors of the plaintiff were five of the thirteen directors of the defendant, with the further fact that two of said five were two of the quorum of eight directors of defendant, who confirmed the contract upon August 2, 1872, rendered such contract in law invalid and voidable, at the election of the defendant, irrespective of the motives of the directors participating. This was intended and understood to mean that such election could then be made, notwithstanding the admitted facts, constituting in law a complete affirmance of the contract.

Whatever may have been the right to avoid the contract, without proof of fraud or unfairness, if exercised at an earlier day, it did not exist at the time of the trial. The question involving the right was therefore wholly removed from the case.

The instruction permitted the jury to give the defendant the benefit of an option which, if formerly existing, had long since been lost by failure to exercise it.

Judgment reversed, and cause remanded for a new trial.

Judgment reversed.

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STATE EX REL. THE ATTORNEY-GENERAL V. COLUMBUS GAS
LIGHT AND COKE COMPANY.

(24 Ohio St. 572.)

Constitutional law — impairing contracts — charter of corporation.

Under a special charter, granted in 1846, the defendant was empowered to "manufacture and sell gas" for the purpose of lighting the city of Columbus. The grant was exclusive for the term of twenty years. The charter contained no provision as to the price to be charged for gas, nor on the subject of meters. *Held*, that the defendant was subject to the provisions of the act of 1867, restricting the price to be charged for the use of meters.

INFORMATION in *quo warranto*. The information charges the defendants with usurping the privilege and franchise of charging each consumer of gas, who consumes five hundred cubic feet or more of gas per month, and compelling him to pay, in addition to the price of said gas, thirty cents, more or less, per month, as rent for the meter that measures the gas to the consumer.

The defendant, in its third plea, justifies the alleged usurpation under a special act of the general assembly, passed February 21, 1846, entitled "An act to incorporate the Columbus Gas Light and Coke Company."

This act provides that the corporation shall have "power to acquire, hold, and occupy such real and personal estate as may be necessary and proper for the construction, extension, and usefulness of the works of the company, and for the management and good government of the same." It also provides that the corporation shall have power to manufacture and sell gas, to be used for the purpose of lighting the city of Columbus, or the streets thereof, and any buildings, manufactories, public places, or houses therein, and to erect necessary works and apparatus for conducting gas in the streets and avenues of the city; and empowers the directors to make such by-laws and rules for their own government, and for regulating the concerns of the company, as they shall think necessary and proper, respecting the management and disposition of the stock, property, and estate of the company, the duties of the agents and artificers to be employed, and all other matters pertaining to the concerns of the company; provided the same shall not be in-

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consistent with the Constitution and laws of the United States or of this State. It also provides: "Said company shall have the exclusive privilege of supplying the city of Columbus and its inhabitants with gas, for the purpose of affording light, for the term of twenty years."

(The opinion states other facts.)

The plaintiff replied, and the defendant demurred.

Harrison & Olds, for relator.

Henry C. Noble, for defendant. A charter of a corporation is a contract. *Knoup v. Piqua Bank*, 1 Ohio St. 603; *Debolt v. The Life Ins. and Trust Co.*, id. 563; *Toledo Bank v. Bond*, id. 622; *Sandusky City Bank v. Wilbur*, 7 id. 481; *Skelly v. Jefferson Br. Bank*, 9 id. 606; *Ohio Life Ins. and Trust Co. v. Debolt*, 16 How. 432; *Mechanics and Traders' Bank v. Debolt*, 18 id. 380; *Dodge v. Woolsey*, id. 331; *Jefferson Br. Bank v. Skelly*, 1 Black, 436; *Ireland v. Turnpike Co.*, 19 Ohio St. 369; *Sebastian Jr., v. Bridge Co.*, 21 id. 451.

Assuming that meter rent is a recognized right of all gas companies, in addition to the price of gas to be charged, and knowing that this company has exercised the right to charge and receive from each consumer, in addition to said price for gas, a sum agreed upon as rent for the meter that measures the gas to the consumer for more than twenty-one years before the issuing of the writ of *quo warranto* herein, it remains to inquire whether this right can be taken away under this law, as an exercise of police powers.

We admit the right in the legislature to provide for the control and regulation not only of corporations, but of every individual in the State under the police power, but as this is a vague and dangerous power, it is the more necessary that courts should carefully scrutinize all acts which profess to be an exercise of police power, to see that, under this name, they do not improperly interfere with the liberty or property of the citizen; for the very object of this power, as well as of all government, is, or should be, the protection of life, liberty, and property. It therefore should ever be the pleasure, as it is the duty, of the courts, to see that no man, or set of men, be they incorporated or unincorporated, be deprived of his or their "property without due process of law." *Cooley on Const. Lim.* 577; *Shaver v. Starrett*, 4 Ohio St. 498; *Reeves v. Treas. Wood Co.*, 8 id. 333; *Cincinnati Gas L. Co. v. State*, 18 id. 237.

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WHITE, J. The question now before us for determination in this case is, whether the defendant in regard to its right to charge rent for gas meters, is subject to the act entitled "an act for the inspection of gas meters, the protection of gas consumers, and the protection and regulation of gas companies," as amended March 9, 1867. S. & S. 160.

Section 15 of the act provides, "This act shall apply to all companies who manufacture gas for sale." And the amendatory act contains this provision: "No gas company shall have the right to charge rent for meters, when five hundred cubic feet per month have been consumed."

The defendant claims that it is not subject to the operation of this statute, and asserts the right under its charter, to exact rent for meters, irrespective of the statute.

This right is denied by the State on two grounds. These grounds, stated in the inverse order in which they are argued, are in substance:

1st. That the right of defendant to charge for the use of meters, as well as for gas furnished, is subject to legislative control.

2d. That if such right of control did not exist under the original charter, yet the defendant, by increasing its capital stock, under the authority of the present Constitution, became subject to such control.

If the first of these positions is well taken, the determination of the correctness of the second is not necessary to the decision of the case before us.

As to the first ground: Whether this ground is well taken or not, depends upon the terms of the charter. The charter provides that the corporation "shall have power to manufacture and sell gas, to be used for the purpose of lighting the city of Columbus, or the streets thereof, and any buildings, manufactories, public places, or houses therein, and to erect necessary works and apparatus for conducting gas in the streets and avenues of the city." The directors of the corporation are authorized to make such by-laws and rules for their own government, and for regulating all matters pertaining to the concerns of the company, as they shall deem necessary and proper; provided such rules and regulations are not inconsistent with the Constitution and laws of the United States or of this State. The charter likewise provides that the "company shall have the exclusive privilege of supplying the city of Columbus

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and its inhabitants with gas, for the purpose of affording light for the term of twenty years."

The corporators and their associates are authorized to employ their means to the extent and in the manner provided by the charter, to accomplish the public purpose of supplying the city of Columbus and its inhabitants with gas. In the accomplishment of this purpose the public have an interest. The main object of the charter was not the private emolument of the corporators and stockholders, but the promotion of the public convenience and welfare. This object, it is true, is to be accomplished upon the terms prescribed by the charter, subject to the right of such supervision and control as may have been withheld in the grant, in favor of the public.

In the present case it is claimed on the part of the defendant that no right is reserved on behalf of the public to control the price of gas, or the amount to be charged for the use of meters; but that this power under the charter rests exclusively in the discretion of the defendant.

Before this right of exemption from legislative control can be asserted, the right must appear to have been clearly granted by the charter. "The rights of the public are never presumed to be surrendered to a corporation, unless the intention to surrender clearly appears in the law." *Perrine v. Chesapeake & Delaware Canal Co.*, 9 How. 172, 184, 192.

The charter in the present instance grants to the defendant the exclusive right of supplying the city and its inhabitants with gas for the term of twenty years. It operates, therefore, not only to confer a public franchise on the defendant, but also to restrict the public from supplying its necessities from any other source. This creates a monopoly in the defendant for the time the right is made exclusive. It is unreasonable, therefore, to infer that it was the intention of the legislature to exempt the defendant from all public control, in respect to the terms upon which it should be required to discharge its duties to the public, unless such intention is found clearly expressed in the charter. The charter expresses no such intention. On the contrary, the plain implications are against the existence of any such exemption. The directors are authorized by the charter to make by-laws and rules for regulating all matters pertaining to the company, but such regulations are required to be consistent with the laws of the State. This pro-

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vision is not limited to laws then in force ; but extends also to such laws as may be passed in the future. The charter does not prescribe *the terms* upon which gas is to be furnished to the public. The whole matter is left to be determined by such rules and regulations, not inconsistent with the laws of the State, as the directors may prescribe.

The business in which the defendant is engaged largely concerns the public. As already remarked, the main purpose of its creation was to subserve the public interest.

In *Munn v. Illinois*, 94 U. S. 113, it was laid down in respect to natural persons, that "where the owner of property devotes it to a use in which the public have an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good as long as he maintains the use."

In that case the principle was applied to warehousemen, who were engaged in receiving and storing grain, and it was held that their rates of charges were subject to legislative regulation.

The principle applies with greater force to corporations when they are invested with franchises to be exercised to subserve the public interest. Deriving their powers by grant directly from the public, they are clearly subject to public control, in respect to the terms upon which their franchises are to be exercised, unless they are protected by their charters from such interference. *Blaks v. Winona & St. Peter Railroad Co.*, 19 Minn. 419 ; s. c., 18 Am. Rep. 345 ; s. c., 94 U. S. 180 ; *Chicago, Burlington & Quincy Railway Co. v. Iowa*, 94 U. S. 155 ; *Peik v. Chicago and Northwestern Railway Co.*, id. 165.

As we find nothing in the terms of the charter of the defendant which protects it from legislative control in respect to the matter in question, the right which it sets up to charge for the use of meters in contravention of the statute, is without warrant in law ; and the plea setting up such right is adjudged insufficient.

Judgment accordingly.

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DILLE V. STATE.

(S. Ohio St. 617.)

Criminal law—limiting time of prisoner's counsel for argument.

On the trial of one charged with a felony, eleven witnesses were examined, and the evidence, which occupied half a day in its delivery, was circumstantial and conflicting. The accused was defended by two counsel, who were limited by the court to thirty minutes in the argument to the jury. *Held*, that this was an abuse of power, which prevented a fair trial.*

CONVICTION of burglary and larceny. The last paragraph of the opinion states the facts.

Johnson & Seney, for plaintiff in error.

Isaiah Pilliams, attorney-general, for defendant in error.

GILMORE, C. J. The only question that will be noticed in this case is, did the court err in limiting the two counsel of the defendant to thirty minutes for the argument of the cause to the jury?

The question is an important one. The three most important constitutional rights which a person accused of felony has, are, (1) a trial by jury, (2) compulsory process for obtaining witnesses in his favor, and (3) the assistance of counsel on his trial.

These are secured to him, in proper cases, not only in the Federal, but also in the State courts by constitutional provisions. Article 3, § 2, and articles 5 and 6 of the amendments of the Constitution of the United States, and §§ 5 and 10 of the bill of rights in this State. As to the importance of the first, see § 1780 of Story on the Constitution. But important as this right is, it would be powerless to fully accomplish its objects without the aid of the concomitant rights of compulsory process for witnesses and the assistance of counsel. These rights, like that of trial by jury, were only secured to the people of England from whence we borrow them by long and persistent efforts.

*See *Williams v. State* (60 Ga. 307), 37 Am. Rep. 412, and note 412; *White v. People*, ante, p. 12.

The fact that we came into possession of them as conceded rights ought not to cause us to underrate or forget their importance. On the contrary, we should admire and commend the wisdom and humanity of those who made the last two, as well as the first of these rights, the subject of both Federal and State constitutional provisions, and it is our duty to see that they are not impaired or denied to any one entitled to the benefit of them.

Section 10 of the bill of rights, among other things, provides that "in any trial in any court, the party accused shall be allowed to appear and defend in person and with counsel."

The discretion which the courts of England exercised in the trial of a party accused of felony, when he was entitled to neither witnesses nor counsel, and when the court assumed to act as his counsel, cannot be exercised by the courts of this State.

The onus of determining within the prescribed rules of practice, what is or is not necessary and essential to the defense, is now devolved on the accused or his counsel, and in determining these, their judgment, and especially that of counsel, is certainly entitled to due consideration by the court.

The court has no discretionary power over the *right* itself, for it cannot be denied. And hence it has no right to prevent the accused from being heard by counsel, even if the evidence against him be clear, unimpeached, and conclusive in the opinion of the court. But the *exercise* of the right is subject to judicial control to the extent that is necessary to prevent the abuse of it. This point seems to be so well settled in this country, that it is needless to cite authorities from other States upon it.

In *Weaver v. State*, 24 Ohio St. 584, two days were occupied in taking the testimony, and during the progress of the trial the court had adjourned over Christmas day, and also adjourned that one of the jurors might attend the funeral of a relative. The court, against the protest of defendant's counsel, limited the argument to five hours on each side. The defendant's counsel took twenty minutes in addition without interruption by the court. It was held that this was not an abuse of the power of control by the court. This holding is still approved, and if even a fourth part of the time that was allowed for argument in that case had been given in this a majority of the court would hold that the court did not err in this case.

It is the practice in this State, so far as I know, to allow a person

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accused of felony to be heard by two counsel if he so desires. If a prisoner is unable to employ counsel, "the court shall assign him counsel not exceeding two, who shall have access to the accused at all reasonable hours." This may be regarded as an expression of legislative intent on this subject.

There were seven witnesses for the State, and four for the defendant. Half a day was occupied in taking the testimony. It was entirely circumstantial, and there was serious conflict in it. Under these circumstances, when the defendant's liberty was at stake, and an ignominious punishment threatening him, he was entitled to be heard in a reasonable manner by both counsel whom he had employed for his defense. His counsel sufficiently indicated that in their judgment the thirty minutes allowed for argument was insufficient, by promptly protesting against it, and the defendant saved his right by excepting to the limitation at the time it was imposed. Finding, as a majority of us do, that the limitation upon the argument was such an abuse of the power of judicial control over the subject as deprived the defendant of a fair trial, the judgment must be reversed, and cause remanded for a new trial.

Judgment accordingly.

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(24 Ohio St. 621.)

Marriage — action by wife for procuring her husband to abandon her — evidence.

A wife may maintain an action for the loss of the society and companionship of her husband, against one who wrongfully and maliciously induces and procures her husband to abandon or send her away. (*See note p. 406.*)

In such an action, the declarations of the husband, made in the absence of the defendant, as to the cause of his abandoning or putting his wife away are inadmissible.

ACTION by wife for procuring her husband to abandon her, by falsely accusing her of unchastity and unfaithfulness. The opinion sufficiently states the case. The plaintiff had judgment below.

O. F. Moore and J. Z. Jones, for plaintiff in error.

Levi Dungan and James Tripp, for defendant in error.

GILMORE, C. J. The objection, that the original petition does not state facts sufficient to constitute a cause of action raises the question: Can a wife maintain an action, in her own name, for the loss of the society and companionship of her husband, against one who wrongfully induces her husband to abandon or send her away?

In answering this question, in view of the legislation of our own state on the subject of the rights of married women, it becomes necessary, not only to look to the doctrine of the common law on the subject, but also to examine the reasons upon which its doctrines rest.

In the early period of English jurisprudence, the personal and marital rights of wives were, in some respects, exclusively cognizable in the spiritual courts, and in other respects, as far as they were recognized at all, in the courts of common law.

The common law considers marriage in no other light than a civil contract, some of the incidents of which will be mentioned hereafter, but the *holiness* of the matrimonial state is left entirely to the ecclesiastical law, the temporal courts not having to consider unlawful marriage as sinful, but merely as a civil inconvenience. The punishment, therefore, or annulling of incestuous or other unscriptural marriages, is the province of the spiritual courts which act *pro salute animarum*. 1 Bl. Com. 432.

The spiritual courts also had cognizance of matrimonial causes or injuries respecting the rights of marriage. Sir W. Blackstone enumerates five of such causes, the third of which is: "The suit for *restitution of conjugal rights*, which is brought whenever either the husband or wife is guilty of the injury of substruction, or lives separate from the other without any sufficient reason, in which case the ecclesiastical jurisdiction will compel them to come together again." 3 Bl. Com. 94. "In the civil law the husband and wife are considered as two distinct persons, and may have separate estates, contracts, debts, and injuries, and therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband." 1 Bl. Com. 444.

It is unnecessary to inquire into the extent to which a wife could obtain redress for injuries to her personal or marital rights in the spiritual courts. The above quotations are made for the purpose of showing that while it may be doubtful, in view of a recent

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discussion of the subject, that will be noticed below, whether the common law regards the *right* of the wife to the *consortium* of her husband, as of such a nature that pecuniary damages can be given her for being wrongfully deprived of it; yet in a jurisdiction that was exercised concurrently with that of the common law, the rights of the wife in these respects were recognized and redressed when injured. The fact, that instead of giving her damages for the loss of the *consortium* of her husband, the spiritual courts restored to her the thing itself, makes no difference in the principle involved. It is a distinct recognition of the rights of the wife in this respect by the ecclesiastical law of England, which was founded on the principles of the civil law. But at common law the husband and wife are one person, that is, the very existence of the woman together with all her personal rights, are suspended during the marriage, or at least are incorporated and consolidated into that of the husband; and upon this principle, of a union in person in husband and wife, depend almost all the legal rights, duties, and disabilities that either of them acquires by the marriage. By the marriage, the husband acquires an absolute title to all the personal property of the wife, and a right to reduce her choses in action to possession, and thereby make them his own; also he becomes entitled to her labor and services or the proceeds of it, for which latter he may sue in his name. An injury to the wife is in legal contemplation an injury to the husband only. For a slight battery of the wife, the husband may recover damages, but for this he must join his wife in the action. If, however, she is beaten so enormously, that the husband is thereby deprived for any time of her company and assistance, the law then gives him an action in his own name for this beating, *per quod consortium amisit*, in which he shall recover a satisfaction in damages. 1 Bl. Com. 442, 3 id. 139, 140.

By comparison the difference between the civil law as administered in the spiritual courts, and the common law as administered in the temporal courts, in respect to the personal and marital rights of the husband and wife, is plainly apparent. In the former they are regarded as distinct persons, and the wife could have her injuries, of which those courts had jurisdiction, redressed in her own name; while in the latter, they are regarded as one person — the husband, whose name must always be used either jointly with the wife, or alone for the redress of injuries to the person or personal rights of the wife.

If, in this State, the common-law dominion of the husband over the property and personal rights of the wife has been taken away from him and conferred upon her, and remedies in accordance with the spirit of the civil law have been expressly given to the wife for the redress of injuries to her person, property, and personal rights, all of which I hope to show has been done, then it must follow that she may maintain an action in her own name for the loss of the *consortium* of her husband against one who wrongfully deprives her of it, unless the *consortium* of her husband is not one of her personal rights. It has been already shown that this was one of her ecclesiastical-law rights; and I have said that it is doubtful whether it is one of her common-law rights. But before coming to the case in which the latter question is discussed, I will recur briefly to the ecclesiastical law. The spiritual courts also had jurisdiction of defamations. In *Palmer v. Thorpe*, 4 Co. 19, it is said; "Touching defamations determinable in the ecclesiastical court, it was resolved that such defamations ought to have three incidents," the first which is, "that it concerns matters merely spiritual and determinable in the ecclesiastical court, as for calling him 'heretic, schismatic, adulterer, fornicator, etc.'"

And it was in consequence of such defamations being regarded as matters merely spiritual, of which the spiritual courts had jurisdiction, that the temporal courts held such words as those above quoted not actionable *per se*; for if they were actionable in both the spiritual and temporal courts, then a party could be twice punished for the same words. *Byron v. Ennes*, 12 Mod. 106; 2 Salk. 694. And here we have the reason why words imputing a want of chastity to a modest matron or a pure virgin, however publicly spoken, were not actionable at common law, without an allegation of special damage.

And here the test question under this rule of the common law may be asked. In an action of slander, brought by a wife, the husband being joined for conformity, will the loss of the *consortium* of her husband, in consequence of the speaking of slanderous words concerning her, constitute special damage, for which the action will lie?

This question was very fully discussed and considered in *Lynch v. Knight and wife*, 9 H. of L. 577. This was an action brought by a wife, her husband being joined as plaintiff for conformity, against N., for a slander uttered by him to her husband, imputing

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to her that she had been "all but seduced by M. before her marriage, and that her husband ought not to suffer M. to visit at his house;" and the special damage alleged was, that in consequence of the slander, the husband had compelled her to leave his house and return to her father, whereby she lost the *consortium* of her husband. It was held that the cause of the complaint thus set forth would not sustain the action, inasmuch as the special damage relied upon did not arise from the natural and probable effect of the words spoken by the defendant, but from the precipitation or idiosyncrasy of the husband in dismissing his wife from his house, when he was only cautioned not to let her mix in society.

But Lord CAMPBELL was of the opinion that a wife can maintain an action against a third person for words occasioning to her the loss of the *consortium* of her husband; and that had the words contained a direct charge of adultery against the wife, he should have thought the allegation of special damage sufficient to support the action. In which view Lord CRANWORTH was strongly inclined to concur.

Lord CAMPBELL further said: "Although this is a case of the first impression, if it can be shown that there is presented to us a concurrence of *loss* and *injury* from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of *consortium*, or conjugal society, can give a cause of action to the husband alone. If the special damage alleged to arise from the speaking of slanderous words, not actionable in themselves, result in pecuniary loss, it is a loss only to the husband; and although it may be the loss of the personal earnings of the wife living separate from her husband, she cannot join in the action. But the loss of conjugal society is not a pecuniary loss; though I think it may be a loss which the law may recognize to the wife as well as to the husband."

In the same case, Lord WENSLEYDALE stated that he had considerable doubt upon the point, but that he had made up his mind that the action would not lie. He said: "It is contended that it may be supported by analogy to the action which the husband may unquestionably maintain for an injury to the wife, *per quod consortium amisit*. I agree with Baron FITZGERALD, that the benefit which the husband has in the *consortium* of the wife is of a different character from that which the wife has in the *consortium* of the husband. The relation of husband and wife is in most respects

entirely dissimilar from that of the master to the servant, yet in one respect, it has a similar character. The assistance of the wife in the conduct of the household of the husband, and in the education of the children, resembles the service of a hired domestic, tutor, or governess; is of material value, capable of being estimated in money, and the loss of it may form the proper subject of an action, the amount of compensation varying with the position of the parties. This property is wanting in none. It is to the protection of such material interests that the law chiefly attends."

This case bears more directly upon the question under consideration than any other English case of which I am aware; for if the loss of the *consortium* of the husband is sufficient to constitute special damage, for which an action of slander would lie at common law, it seems to me that there can be no doubt that under our statute, such loss will constitute a good cause of action in favor of the wife, directly against one who wrongfully causes the loss; and while the discussion leaves the question in doubt at common law, the grounds upon which the judges differ are clearly indicated.

If the husband can maintain an action for the loss of the *consortium* of the wife, then it seems to me that Lord CAMPBELL is clearly right when he says that he cannot allow the action, for this cause, to the husband alone, and that the loss of conjugal society, though not pecuniary, is a loss which the law may recognize to the wife as well as to the husband.

To avoid the force of this proposition, the language of Lord WENSLEYDALE is open to the inference that the husband cannot maintain an action for the loss of the *consortium* of the wife alone, and not the loss of her *society*, which is of no pecuniary value, and that it is the loss of her *services*, which are of material value, that constitutes the *gist* of the action which the husband may maintain for an injury to the wife; but when the action is well brought for loss of services, it is further to be inferred that the jury may, as they always do, give damages, varying with the position of the parties, commensurate with the real injury, including the loss of *consortium*.

This unsatisfactory state of the common law in reference to the rights of the wife is, I apprehend, partly owing to the subject being cognizable in two jurisdictions, and partly to the common-law unity of person in husband and wife, and the legal incidents that flow from this unity, both of which were noticed above.

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Having shown the doubtful aspect of this question at common law, it will be my object now to show that the reasons that gave rise to those doubts, either never existed in this State, or that they have been swept away by legislation.

In the first place, the subject of marriage and marital rights has never been cognizable in two independent jurisdictions in this State; hence, in defamations, there was no danger of a person being twice punished for the same words; and consequently it has long been the settled law of this State, that words imputing a want of chastity to a woman, married or single, are *per se* actionable. *Sexton v. Todd*, Wright, 317; *Watson v. Trask*, 6 Ohio, 532; *Reynolds v. Tucker*, 6 Ohio St. 516.

In this respect, therefore, the law of this State has never been in accord with the common law.

Neither could a suit for *restitution of marital rights* ever have been maintained in any of the courts of this State, as it could in the ecclesiastical courts of England; and hence, none of the embarrassments that grew out of two jurisdictions having cognizance of different branches of the same subject-matter have ever existed here. With us, as shown below, whatever rights, legal or equitable, are recognized to the wife, she may defend when threatened or redress when injured, by actions in her own name.

In the next place, let it be admitted, that at common law, Lord WENSLEYDALE is correct in saying that the benefit which the husband has in the *consortium* of the wife is of a different character from that which the wife has in the *consortium* of the husband; and that the difference consists in the fact that the wife in some respects resembles a hired domestic, to whose services the husband is entitled in his own right; let us see if this doctrine of the common law has not been overthrown by the legislation of this State.

By the act of 1861, S. & S. 389: "All personal property, including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture by gift, bequest, or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or have grown out of a violation of any of her personal rights, shall, together with all income, increase, and profit thereof, be and remain her separate property, and under her sole control."

Section 28 of the Civil Code, as amended March 30, 1874, pro-

wides as follows : " Where a married woman is a party, her husband must be joined with her, except when the action concerns *her separate property*, or is upon a written obligation, contract, or agreement signed by her, or is brought by her to set aside a deed or will, or if she be engaged as owner or partner in any mercantile business, and the cause of action grows out of or concerns such business, or is between her and her husband, she may sue or be sued alone. * * * But in no case shall she be required to prosecute or defend by her next friend."

This legislation, in effect, abolishes the common-law unity of person in husband and wife, so far as that unity is represented solely by the husband, and in its stead introduces a rule analogous to that of the civil law, by which the wife is so far regarded as a distinct person, that she may have her separate property, contracts, credits, debts, and injuries growing out of a violation of any of her personal rights, all of which shall be and remain under her sole control ; and in matters concerning them, or any of them, she may sue or be sued alone. Even the wages due for the wife's separate labor, which are of material value, capable of being estimated in money, and to which the common law chiefly attends in giving the husband an action for an injury to the wife, by reason of which he lost her services, has been taken from the husband and given to the wife ; not only this, but she may sue for such wages, and also for such injury, in her own name, and the husband cannot, without her consent, acquire any interest in either.

Consequently, in this respect at least, under our legislation, the benefit which the wife has in the *consortium* of the husband is equal to that which the husband has in the *consortium* of the wife. If at common law the husband could maintain an action for the loss of the *consortium* of the wife, I can see no reason why, under our law, the wife cannot maintain an action for the loss of the *consortium* of the husband. And if it be said that it was the loss of the *services* of the wife that constituted the *gist* of the husband's actions in such cases, it is a sufficient answer to it to say that the reasons upon which this rule of the common law rested, either never existed or have ceased to exist in this State.

In *Clark v. Harlan*, 1 Cin. Sup. Ct. R. 418, it is held that the wife may maintain an action for the loss of the conjugal society of the husband.

In Cooley on Torts, 227, in a note referring to *Lynch v. Knight*,

supra, the learned author closes by saying : " We see no reason why such an action should not be supported, where by statute the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her."

Is the right of the wife to the *consortium* of the husband one of her personal rights ? If it is, then the statute makes the right of action growing out of an injury to the right, the *separate property* of the wife, for which the Code gives her a right to sue in her own name. Before marriage the man and woman are endowed with the same personal rights. If under no disability, each is competent to contract. When the agreement to marry is entered into, but before its consummation, each has the same interest in it, and either may sue for a breach of it by the other. In this State neither the husband nor wife unconditionally surrenders their personal rights by consummating the contract of marriage. On the contrary, each acquires a personal as well as legal right to the conjugal society of the other, for the loss of which either may sue separately.

A majority of the court are of the opinion that there is a good cause of action stated in the petition.

2. Did the court err in admitting the declaration of the husband made in the absence of the defendant, to the effect that the defendant was doing all he could to bring about a separation between the plaintiff and her husband ? We think it did. This was clearly hearsay testimony, and nothing else.

In an action for enticing away the plaintiff's wife, the declarations of the wife are not admissible in evidence. *Winsmore v. Greenbank*, Willes, 577.

The confessions of the wife, in an action by the husband against her seducer, are not evidence against the defendant. *Bull. N. P.* 28.

So, in an action against a third party for inducing the plaintiff's husband to send her away, the declarations of the husband, made in the absence of the defendant, are not admissible in evidence.

3. Did the court err in refusing to charge that to entitle the plaintiff to recover, the defendant must have maliciously caused the separation of the husband and wife ?

This charge ought to have been given. The term " malice," as applied to torts, does not necessarily mean that which must proceed

from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind, not sufficiently cautious before it occasions an injury to another. 11 Serg. & R. 39, 40. If the conduct of the defendant was unjustifiable and actually caused the injury complained of by the plaintiff, which was a question for the jury, malice in law would be implied from such conduct, and the court should have so charged.

For error in admitting the declarations of the husband, and in refusing to charge as requested, the judgment must be reversed, and the cause remanded to the Court of Common Pleas for a new trial.

Judgment reversed.

NOTE BY THE REPORTER.—We report this case, contrary to our custom not to report cases decided by a majority of one, on account of its novelty and importance. The dissenting opinion by WHITE, J., is as follows:

WHITE, J., dissenting. I concur in the reversal of the judgment in this case; but in my opinion the petition does not show a cause of action. The grounds of this opinion I will endeavor to briefly state.

1. The act of April 3, 1861, "concerning the rights and liabilities of married women" (S. C. S. 389), does not create a cause of action in right of the wife, where none existed before, but merely declares that rights in action which "have grown out of the violation of any of her personal rights, shall * * * be and remain her separate property, and under her sole control." It was not the object of the statute to create new liabilities against third persons in favor of the wife, but to prescribe what property and rights in action should, as between the husband and wife, be the separate property of the wife. What constitutes her personal rights, or a right in action for their violation, is left to be determined by the common law. At common law, the wife had no such right as is recognized in this case. 2 Shars. Bl. Com. 143*, 143.

For the violation of every common-law right, there was a common-law remedy; and no action that could not have been maintained jointly by the husband and wife, for the violation of the personal rights of the wife, before the statute was passed, could be maintained after the passage of the statute. That act did not change the common-law right or the common-law remedy, but merely declared the right which was the subject of the action, to be the separate property of the wife. By section 28 of the Code, as amended, she was authorized to sue in her own name; but that section does not create a cause of action where none existed before. It was merely intended to prescribe the cases in which she may sue and be sued alone. *Allison v. Porter*, 29 Ohio St. 136.

2. The decision in *Lynch v. Knight*, 9 H. of L. 577, does not support the holding of the majority of the court in the present case. In England as in most of the States, words imputing want of chastity to a woman are not actionable, unless they occasion special damage. In *Lynch v. Knight*, the chancellor, Lord CAMPBELL, and the lords concurring with him, were of the opinion that where the other necessary facts existed to constitute a cause of action, in right of the wife, the loss of the *consortium*, or conjugal society of the husband would constitute the grounds of special damages, although not of a pecuniary nature. There is no intimation that there could be a cause of action in right of the wife, when there could be no recovery in a joint action by the husband and wife. On the contrary, it is apparent from the opinions that if there could be no joint recovery, there would be no cause of action. On page 590, Lord CAMPBELL says: "I place no reliance on the objection that, in a case like the present, the imputation cast on the wife being false, the act of the husband in separating from her is wrongful, and therefore he cannot join as plaintiff in an action, the foundation of which is his own wrongful act. If his dismissal of the wife from his house would have been reasonably justifiable, had the words been true, and this act was a natural, probable, and direct consequence of the imputation, I do not think the de-

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defendant could avail himself of the objection of the imputation being false, he having intended the husband to believe that it was true, and having intended the husband to act upon it." And on page 591 he says: "Had those words contained a charge of adultery by the wife, which the defendant pretended to know, and which he asserted as a fact, I should have thought the allegation of special damage sufficient to support the action. In that case, the husband believing the charge to be true, would have been justified in separating from his wife, and this separation would have been the natural and direct and probable consequence of the slander." To the same effect is the language of Lord CAMPBELL on page 590.

In the present case the alleged slanderous words are not set out in the petition. Hence it does not appear whether they imputed want of chastity to the plaintiff or not, or whether they were of such a character as, if true, would have justified her husband in separating from her. If the words imputed want of chastity to the plaintiff, they would, in this state, have been actionable in themselves, and would have supported an action by the husband and wife, or under section 28 of the Code, the plaintiff might have sued alone.

The averment in the petition that the defendant promised to reward the husband with money and property if he would expel the plaintiff from his house and companionship constitutes no cause of action. It was his duty not to accept the promise or act upon it, and if he did either, it would be his own voluntary wrongful act, and would defeat any action in which he was required to join as plaintiff.

The rule of common law that requires an action for an injury to the wife, to be prosecuted in both the name of the husband and wife, was not merely remedial in its nature. It defined the rights of the wife as well as prescribed the remedy for their violation; and grew out of the structure of the common law as a system of rights and remedies.

3. Whether the petition shows a cause of action or not, is to be determined by the common law as modified by our legislation. The ecclesiastical law of England was no part of the common law, and has never been adopted here. The contract of marriage is regarded by the common law as a civil contract merely, and the relation of marriage as a civil relation; and over civil rights and remedies the spiritual courts had no jurisdiction. The only pecuniary causes cognizable in these courts were such as arose either from withholding ecclesiastical dues, or the doing or neglecting some act relating to the church; and the only process of enforcing their sentences was by *excommunication*. With due deference, I must be allowed to say that it seems to me the jurisdiction exercised by the ecclesiastical courts has no bearing on the question, whether such jurisdiction was exercised for the *restitution of conjugal rights*, or to create them by compelling the parties to celebrate a marriage in pursuance of their contract, both of which were within their jurisdiction.

OKRY, J., concurs in the foregoing opinion of WHITE, J.

In *Bretman v. Paasch*, a similar action in the city court of Brooklyn, 7 Abb. N. C. 249, the following opinion was pronounced at Special Term and affirmed at General Term.

MASON, C. J. The circumstances of this case are simple and significant. It appears that the plaintiff was living in harmony with her husband, enjoying his protection and support, and that the defendant enticed the plaintiff's husband away, and caused a separation. For that alleged willful, malicious, and illegal act, the plaintiff brings the action to recover damages, and procures an order of arrest.

On this application to set aside that order two questions are presented: First, will the action lie? If it will, was the defendant liable to arrest?

We have in this State no precedent for an action of this precise character. But like actions have received judicial sanction elsewhere. It was thus in the case of *Lynch v. Knight*, 9 H. L. Cas. 577. In that suit the plaintiff charged that her husband had sent her away because of certain words spoken of her by the defendant. No improper act had been imputed to her by the defendant, and the words spoken were too trivial to lead to a separation. The deprivation suffered by her was imputable to the whim or undue sensitiveness of the husband rather than to the malicious purpose or intent of the defendant. The judgment was reversed on that ground. In the opinion of the late Lord CAMPBELL it is said, "Although this is a case of the first impression, if it can be shown that there is presented to us a concurrence of loss and injury from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of *consortium*, or conjugal society, can give a cause of action to the husband alone;" and such also was the view of

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Lord CHANWORTH. Some of the members of the court thought otherwise, but all concurred in holding that no consequential damages could have arisen from the interference of the defendant. In *Westlake v. Westlake*, action by the wife against her father-in-law, the Supreme Court of Ohio held that the action could be maintained for the loss of the society and companionship of the husband. The opinion of Chief Justice GILMORE is elaborate, a learned and well-considered exposition, in which a majority of the court concurred. That decision is worthy of great respect.

But withholding such aid, I should have little hesitation in holding that the plaintiff is entitled to the relief sought. This is a special action on the case for a wrong; and for every wrong willfully, or even negligently inflicted, and causing loss and damage, there is a remedy. That is so with us, even if the party injured be a married woman. Many of the disabilities imposed on her by the common law have been shaken off, and she may now sue and be sued without the consent of her husband, and without his being a party to the record.

It is said that the cases above cited were mere actions of slander. But the real grievance was the separation charged to have been caused by the spoken words; and in the Ohio case it was alleged that the defendant had urged and persuaded his son to send his wife away. If dismissing the wife, as in that case or in this, was a wrong of which the law could take notice, as against the person offering the husband the inducement, it is not material by what evil influence the separation was brought about. A good complaint might have been framed without stating the inducement, somewhat as a cause of action for a brutal assault might be stated without alleging what, if any, weapon was used by the defendant. It would be strange if the wrong here charged could only rise to the dignity of legal recognition as an incident to a suit for slander; if this plaintiff could have a right of action against the defendant for mere negligence in crowding her off a railroad car and causing slight personal injury, but no right of action for willfully and maliciously breaking up her home.

It is no answer for the defendant to say that the plaintiff could seek redress against her husband, bring an action for divorce, and, crying for bread, possibly obtain an order that he pay alimony. It would be a reproach to the law, alike illogical and immoral, if such a defense could prevail.

CITY OF TIFFIN V. MCCORMACK.

(34 Ohio St. 638.)

Trespass—injury to plaintiff's buildings by defendant's blasting on his own lands—contractor—master and servant.

Where the owner of a stone quarry, by blasting with gunpowder, destroys the buildings of an adjoining land-owner, it is no defense to show that ordinary care was exercised in the manner in which the quarry was worked.

The owner of a stone quarry hired a person "to go into the quarry, quarry stone therein, break the same to a certain size, and pile them up so they can be measured," and "had no other or further control" over the employee, who was "to furnish and find the gunpowder and other tools," and receive compensation at the rate of \$1 per perch; and the employee, by blasting with gunpowder, destroyed the buildings of an adjoining proprietor. *Held*, that the employer is liable for the injury inflicted by the employee.*

*See *Huff v. Ford* (126 Mass. 24), 30 Am. Rep. 645; *Harrison v. Collins* (36 Penn. St. 153), 27 Am. Rep. 699, and note, 702.

City of Tiffin v. McCormack.

ACTION of damages for injury to plaintiffs' building for blasting on defendant's land. The plaintiffs had judgment, and the following bill of exceptions was taken :

"Be it remembered that upon the trial of this cause by a jury in said court of the February term thereof, 1874, the plaintiffs, to maintain the issues upon their part, offered and gave evidence tending to prove that one Joseph Ardner, on the day the building and other property mentioned in the petition was burned, was engaged in blasting stone in a stone quarry near to the buildings so burned, and tending to prove that said building and other property was burned by fire communicated by the operations of said Ardner in blasting stone in said quarry, and also proved that said Ardner was quarrying stone for the defendant in a stone quarry belonging to the defendant, which stone were to be broken by said Ardner, and to be used by the defendant in improving or repairing its streets.

"And thereupon the said defendant, the city of Tiffin, to maintain the issues on its part, proved that upon the occasion mentioned and referred to in the petition of the said plaintiffs herein, and in their said testimony, it had hired or engaged the said Ardner to go into its said stone quarry, quarry stone therein, break the same to a certain specified size, pile them up in said quarry so that they could be measured, and to furnish and find the powder and tools for said work — all for and at the agreed price of one dollar for each and every perch as measured in said quarry. That it had no other or further control over said Ardner in said work. And that the said stone so quarried, broken, and piled up by said Ardner, in said quarry under said engagement, was for improving the streets of the said defendant.

"The defendant thereupon requested the court to charge and instruct the jury—

"That if Mr. Ardner quarried this stone and broke it to a certain size under an agreement with the city of Tiffin, to get a certain price a perch for the quantity of stone so broken and quarried, and if under his agreement with the city he was to manage the work in his own way, and the city did not reserve the right to control and direct him in said work, and the mode and manner of doing it, further than to require said stone to be broken to a certain size and so piled up as to be measured, then and in that case he would not be the agent or servant of the city, and if not such agent

or servant, then the city would not be liable for any injury resulting from the mode and manner of doing the work, or the means used in its performance. Which charge and instruction the court refused to give to the jury, and the same was not given.

"But the court did thereupon charge the jury, that if the said property of the said plaintiffs was burned and damaged by fire communicated to it by said Ardner in his blasting the said stone in said quarry, under the said engagement proven by the said defendant, then the plaintiffs were entitled to their verdict for the value of their property so burned and damaged.

John McCauley and A. Landon, for plaintiff in error, cited *Clark v. Fry*, 8 Ohio St. 358; *Cincinnati v. Stone* 5 Ohio St. 38; 1 Pars. on Cont. (5th ed.) 102-104, 108; Dill. Mun. Corp., §§ 772, 773; *McCafferty v. Railroad Co.*, 61 N. Y. 178; s. c., 19 Am. Rep. 267; *De Forrest v. Wright*, 2 Mich. 368; *Church Proprietors v. Bullard*, 2 Metc. 363; *Canal Co. v. Gordon*, 16 Wall. 566.

George W. Bachman and N. L. Brewer, for defendants in error.

MOILVAINE, J. It is claimed, by plaintiff in error, that the relation shown to have existed between the city and Ardner was that of employer and independent contractor, from which no liability falls upon the employer on account of the manner in which the employment is prosecuted, the rule being, in such case, that the contractor is alone responsible for an injury inflicted upon third persons by reason of his wrongful act.

We concede the general rule of law to be that an independent contractor is alone responsible for an injury inflicted by him upon third persons, and that his employer is not within the principle upon which the doctrine of *respondet superior* rests. Yet, it is equally certain, that the employer is also liable for the wrongful act of the contractor under circumstances which show that he, as clearly as the contractor, was the author and promoter of the injury. For instance, where the prosecution of the work as authorized by him necessarily produces the injury, he, as well as his contractor, is responsible for the damage. *McCafferty v. Railroad Co.*, 61 N. Y. 178; s. c., 19 Am. Rep. 267. And again, when the contractor prosecutes his work in the manner authorized by the employer in the express terms of the contract, the employer must be regarded as having assented to, and as procuring the unlawful act to be done,

and is therefore liable as a joint wrong-doer. *Carman v. S. & S. Railroad Co.*, 4 Ohio St. 399. Within the principle of the case last cited, the liability of the city for the wrongful act of Ardner, although he be considered as an independent contractor, must be affirmed; for it clearly appears that the work of quarrying stone on the city's premises, by blasting, was clearly assented to and authorized.

But we are of opinion that the true relation between the city, as proprietor of the stone quarry, and Ardner, was that of master and servant, instead of employer and independent contractor within the principle of the rule above stated. There was no "job" or defined quantity of work contracted for. The services of Ardner were subject to be determined at the pleasure of either party. The compensation was to be measured by the quantity of labor performed. It appears to us to have been an ordinary contract for work and labor, which creates, between the employer and employed, the relation of master and servant, within the meaning of the law in regard to that subject. It is true that the service, namely, the quarrying of stone in the employer's quarry, was to be done by the use of powder and tools furnished by the employee; but this condition in the contract did not affect the legal relation between the parties. It was significant only as a matter affecting the rate of compensation. And it is also true, that the city "had no other or further control over Ardner in said work." Whether this language means that the city exercised no other or further control, or that the city contracted with Ardner that it would not exercise any other or further control over the work, makes no difference. If it were a mere failure to exercise control, it was the fault of the city. If it was part of the contract with the servant, that no other or further control should be exercised by the city, it is enough to say that a master cannot exonerate himself from responsibility to third persons, which the law imposes upon him, for injury resulting from the misconduct of his servant, by contracting with the servant that he will not exercise any control over him, and will not, therefore, be responsible for any injury that he may wrongfully inflict.

It only remains, therefore, to be considered whether the city of Tiffin, if the injury complained of had been inflicted upon the defendant in error, by its own act, would be liable for the damages. That a municipal corporation, as the proprietor of lands, would be responsible for an injury resulting from the use of its own property to an adjacent proprietor, to the same extent as if it were a natural person, is not questioned

As between the owners of adjacent lands, the maxim of the common law *Sic utere tuo ut alienum non lædas*, applies with special force; not because it forbids the exercise of the right of dominion or control of property, according to the pleasure of the owner, in one case more than in another, whether it be real or personal property, or whether it be owned for special or general uses, but because the right to use or control it, according to the pleasure of the owner, is limited under some circumstances more than under others. Undoubtedly, the right to use property as the owner may please, provided that reasonable care is taken not to do unnecessary injury to others, is the ordinary rule. But this rule cannot be interposed to justify the committing of a trespass or the maintaining of a nuisance. A man who digs a pit on his own land, whereby the soil of an adjoining proprietor is disturbed on account of the loss of lateral support, cannot justify his act on the ground that he used reasonable care to prevent the injury. Neither can one in possession of a parcel of land operate and manage a mine or quarry upon it in such manner as to injure or destroy the property of an adjoining proprietor, justify himself by showing that he used ordinary care in the use of his own property. In such cases, the right to use is subject to the limitation that its use will not injure his neighbor. The true doctrine upon this point is well stated in the case of *Hay v. Cohoes Co.*, 2 Comst. 159, as follows: "The use of land by the proprietor is not therefore an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motives of the aggressor. A man may prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of lawful trade. 9 Coke, 58. He may excavate a canal, but he cannot cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner." And in *Tremain v. Cohoes Co.*, id. 163, it was held, that in such case, evidence to show that the work was done in the most careful manner is inadmissible where there is no claim made for exemplary damages. *Judgment affirmed.*

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

NAGLE V. ALLEGHENY VALLEY RAILROAD COMPANY.

(88 Penn. St. 35.)

Negligence — contributory — infant — presumptions.

In the absence of clear proof to the contrary, an infant of the age of fourteen years will be presumed to have sufficient capacity to recognize and avoid danger.*

ACTION of damages for death of plaintiff's son caused by defendant's negligence. The opinion states the facts. The plaintiff was nonsuited.

Moore & Milligan, for plaintiff in error. The question of contributory negligence is to be determined by reference to the age and intelligence of the person injured, and the circumstances under which the injury was sustained; and under this principle the plaintiff was clearly entitled to recover. *Pennsylvania Railroad Co. v. Kelly*, 7 Casey, 377; *Rauch v. Loyd*, id. 370; *Oakland Railway Co. v. Fielding*, 12 Wright, 320; *Crissey v. Hestonville Ry. Co.*, 25 P. F. Smith, 83; *P. & R. Railroad Co. v. Long*, id. 257; *Philadelphia City Passenger Ry. Co. v. Hassard*, id. 367.

* See *Hestonville Passenger Ry. Co. v. Connell*, post.

Nagle v. Allegheny Valley Railroad Company.

Hampton & Dalzell, for defendant in error.

PAXSON, J. It was conceded upon the argument that if the deceased boy, Jacob Nagle, had been an adult, the defendant corporation would not have been responsible for his death, for the reason that it was the result of his own rashness in attempting to cross the track immediately in front of the locomotive. At the time of the unfortunate accident, which resulted in his death, he was employed in the steel works of Messrs. Reese, Graff & Woods, on Thirty-second street, in the city of Pittsburg. The Allegheny Railroad Company had a lateral track for the accommodation of the steel company, from their main track along Thirty-second street to the Allegheny river. The buildings of the company were erected on both sides of Thirty-second street, and the lateral road ran within three or four feet of the buildings on the west side. Sliding-doors gave exit immediately on to the track. The boy was employed in the buildings on the east side of the street; and at the dinner hour had gone over to the buildings on the west side to eat his dinner with other boys of his acquaintance. Whilst sitting there, the whistle sounded for return to work, upon which he instantly started to run across to his own shop, and in doing so, passed out of the sliding-door to cross the track, was caught by a passing locomotive and instantly killed. At this point he could not see the engine, nor could the engineer see him. The mill had started up, and the noise of the machinery probably prevented his hearing the approach of the engine or the ringing of the bell, if in point of fact the bell was rung. The place where the accident occurred was a place of danger; an engine was liable to pass along by the sliding-door at any moment. What occurred, is told by Frederick Kiefer, a witness for the plaintiff, in a few words: "Just as I entered the mill I heard the whistle blow; after I entered the building, the whistle ceased blowing, and at that moment the boy rushed past me on to the railroad track, and the locomotive ran over him." Upon this state of facts, the learned judge nonsuited the plaintiff, and subsequently refused to take the nonsuit off, which is assigned for error here.

It is undoubtedly true that negligence cannot be imputed to one who has not sufficient capacity or discretion to understand the danger, and to use the proper means to guard against it. Thus, it has been repeatedly held, that when an injury has been inflicted

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upon a child of tender years, by negligence on the part of corporations or individuals, the incapacity of the child to know the danger and avoid it shields it from responsibility. It is sufficient for present purposes, to cite *Rauch v. Lloyd*, 7 Casey, 370; *Smith v. O'Connor*, 12 Wright, 222; *North Penn. R. R. Co. v. Mahoney*, 7 P. F. Smith, 187; *Kay v. Penn. R. R. Co.*, 15 id. 276; *Railway Co. v. Caldwell*, 24 id. 421; *Same v. Hazzard*, 25 id. 367; *Same v. Lewis*, 29 id. 33. It was strongly urged that the case in hand falls within the principle and authorities above cited, and that at least the case should have gone to the jury upon the question of the concurring negligence of the boy, in connection with his age and the surrounding circumstances; that it was error for the court to declare the responsibility of the boy for his admitted negligence.

It is the province of the jury to settle controverted questions of fact. Upon an admitted state of facts it is the duty of the court to declare the law. *Hoag v. The Railroad Company*, 4 Norris, 293. Nor are questions of negligence an exception to this rule. There are certain things which the law declares to be negligence *per se*; the duty being the same under all circumstances. Thus, it has been repeatedly held, that when a person attempts to cross a railroad track, it is his duty to stop, look and listen, and that the omission to do so is negligence. *Pennsylvania R. R. Co. v. Beale*, 23 P. F. Smith, 507; s. c., 13 Am. Rep. 753; *Railroad Co. v. Stinger*, 28 P. F. Smith, 219; *Penn. R. R. Co. v. Barnett*, 9 id. 259; *McCully v. Clarke*, 4 Wright, 399. Under this rule, upon the plaintiff's own showing, it was the duty of the court to nonsuit him, unless it appears from the evidence, that the deceased boy was of such tender years or limited mental capacity as not to be responsible for his own negligence.

All of the cases above referred to were those of mere children. We are dealing with a different question. Jacob Nagle, at the time of his death, was between fourteen and fifteen years of age. His father had placed him in this rolling-mill some two months previously. He was there earning his living in a regular employment. The employment itself was a dangerous one. There is not an hour of the day when the machinery of a rolling-mill is in operation, that vigilance and care are not required on the part of the employees to avoid injury. It ill becomes the father who placed this boy amid such scenes of danger, and who is seeking to recover damages for his death, now to aver that his son was of such tender

years or feeble mind as to be unable to understand the danger or to avoid it. No such attempt was made upon the trial of the case. No evidence was offered to show that although he had arrived at years of puberty, he was yet immature for his age; that although earning his support in a dangerous mill, and acting the part of a person of mature years with his father's consent, he was yet a mere child in intelligence and physical strength. Such evidence would have been competent. Its absence leaves the argument of the plaintiff without any base for its support.

The law fixes no arbitrary period when the immunity of childhood ceases and the responsibilities of life begin. For some purposes majority is the rule. It is not so here. It would be irrational to hold that a man was responsible for his negligence at twenty-one years of age, and not responsible a day or a week prior thereto. At what age then must an infant's responsibility for negligence be presumed to commence? This question cannot be answered by referring it to the jury. That would furnish us with no rule whatever. It would give us a mere shifting standard, affected by the sympathies or prejudices of the jury in each particular case. One jury would fix the period of responsibility at fourteen, another at twenty or twenty-one. This is not a question of fact for the jury. It is a question of law for the court. Nor is its solution difficult. The rights, duties and responsibilities of infants are clearly defined by the text-writers, as well as by numerous decisions. Upon so plain a question it is sufficient to refer to 1 Sharwood's Blackstone, 435, 464; 4 id. 20, where we learn that fourteen is the age of discretion in males and twelve in females; that at fourteen an infant may choose a guardian and contract a lawful marriage. His responsibility to the criminal law is equally well settled. Under seven years of age an infant cannot be guilty of felony, for then a felonious discretion is almost an impossibility in nature; but at eight years old he may be guilty of felony; Dalt. Just., ch. 147. Between the ages of seven and fourteen, though an infant shall be *prima facie* adjudged to be *deli incapax*, yet if it appear to the court and jury that he was *deli capax*, and could discern between good and evil, he may be convicted and suffer death. After fourteen an infant is responsible for his crimes to the same extent as an adult.

We have thus seen that the law presumed that at fourteen years of age an infant has sufficient discretion and understanding to select

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a guardian and contract a marriage ; is capable of harboring malice and of taking human life under circumstances that constitute the offense murder. It therefore requires no strain to hold that at fourteen an infant is presumed to have sufficient capacity and understanding to be sensible of danger, and to have the power to avoid it. And this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years of age.

The essential facts of this case not being in dispute, the court below was right in directing a nonsuit. Upon his own showing, the plaintiff was not entitled to a verdict. It was one of those painful actions for which the law does not furnish a remedy in damages.

Judgment affirmed.

AGNEW, C. J., and GORDON, J., dissented.

CRAIG V. FIRST PRESBYTERIAN CHURCH OF PITTSBURGH.

(38 Penn. St. 42.)

Burial grounds — legislative right to authorize removal of remains — "religious purposes" — Sunday school rooms — privilege of sepulture.

The legislature has a right to authorize a municipality to remove the remains of the dead from cemeteries.

A building for the sessions of a Sunday school and religious lecture is for a "religious purpose," although occasionally used for fairs and other benevolent purposes.

The right of burial in a church-yard is a privilege enjoyable only so long as the ground continues a church-yard, and is subject to any right of the church to abandon it ; and one who is merely a pew holder, or has relatives buried in the yard, and has no contract relation with the church, cannot maintain the objection that an act of the legislature authorizing the removal of the dead from such church-yard impairs the obligation of a contract. (*See note, p. 424.*)

PETITION by defendant for authority to remove the remains of the dead from their church-yard. The opinion states the facts. Petition granted below.

M. W. Ackeson and George W. Guthrie, for exceptants.

David W. Bell, contra.

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PAXSON, J. It was provided by the first section of the act of 18th of April, 1877, Pamph. L. 54, "That when by the growth of cities and the opening of incorporated cemeteries in the vicinity thereof, or from other causes, any burial ground belonging to or in charge of any religious society or church, directly or through trustees therefor, has ceased to be used for interments, the courts of Quarter Sessions of the several counties of this Commonwealth, upon petition of the managers, officers or trustees of such society or church, setting forth that the erection, extension or improvement of buildings for religious purposes of such society or church is hampered or interfered with, and the welfare of such religious society or church is injured to the detriment thereof and of the public good, and after four weeks' advertisement of hearing in open court for the purpose, may, after a full hearing of the parties therein, proofs and allegations, authorize and direct the removal of the remains of the dead from so much of such burial ground as may be needed for buildings for religious purposes only, by the managers, officers or trustees of such society or church; *Provided*, that no such application shall be made by the managers, officers or trustees of such society or church, except in pursuance of the wishes of a majority of the members of such society or church, expressed at a church election, held for that purpose after two weeks' public notice." Under this act, the trustees of the First Presbyterian Church of Pittsburgh presented their petition to the Court of Quarter Sessions of Allegheny county, setting forth, *inter alia*, that the burial grounds attached to and belonging to said church had ceased to be used for the interment of the dead; that a portion of said ground was needed for the erection of a new Sabbath school building and lecture room; that such building was intended only for the religious purposes of said church, and that the same is interfered with, to the detriment of the said church and the public good; that in accordance with the terms of said act of assembly, at the request of the trustees of said church, public notice was given from the pulpit in said church on the three Sabbath days preceding the 18th of April, 1877, that on said day, a meeting of the congregation would be held in the church, for the purpose of voting whether or not the trustees should be requested to petition the said court to authorize and direct the removal of the remains of the dead from a portion of the burying ground of the church, needed for the erection of a new Sabbath school building and lec-

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ture room ; that thereupon, after said public notice, a meeting of said congregation was held at the time and place appointed, which was duly organized, and at which the wishes of a majority of the members of said congregation were expressed in favor of such removal, and a resolution was passed directing the trustees to petition the court for that purpose. The petition was so proceeded in, that said court substantially made a decree granting the prayer of the petitioners, and ordering the removal of the remains of the dead from a portion of said burial ground, specifying the same by metes and bounds. The plaintiffs in error filed a number of exceptions to the said petition and decree, which were overruled by the court below, whereupon said plaintiffs removed the record to this court by writ of *certiorari*. The assignments of error, which are somewhat numerous, may be reduced to four heads, viz.: 1. The act of April 18th, 1877, under which the proceedings were had, is in violation of the Constitution, for the reason that the subject of said act is not clearly expressed in the bill ; 2. That the proceedings are irregular ; 3. That the case of the petitioner is not within the purview of said act of assembly ; and 4. The legislature had not the power to authorize the removal. We will consider these objections in the order in which they are stated.

[Omitting some minor considerations.]

The objection that the case of the petitioners is not within the purview of the act of assembly involves the further proposition, that the purposes to which the proposed new buildings are to be put are not the religious purposes contemplated by the act. If the petitioners are wrong as to the second proposition, the first necessarily falls with it. The petition alleges that the new building is to be applied only to the religious purposes of said church. There is nothing in the record that contradicts this assertion. The Sunday school rooms and the lecture room of a modern church are as essentially used for religious purposes as the body of the church building itself. The Sabbath schools are an important auxiliary of every Christian church, and indispensable to its life and growth. That the services in such schools are in the main of a religious character is too well known to be seriously disputed. So of the lecture room. It is used for the mid-week evening lectures and other services, when the attendance is not large. The expense of lighting and heating the main church building is thus avoided.

But the services upon such occasions are as truly religious in their character as the sermon upon the Sabbath. *Gass's Appeal*, 23 P. F. Smith, 46; s. c., 13 Am. Rep. 726, has no application to the point in controversy. There, a German Reformed congregation and a Lutheran congregation built a church together, in which by their articles of association, "Divine service" only was to be held; for many years there were no meetings in it except for public worship.

It was held under the facts of that case, that "Sabbath schools" were not included in the term "Divine service," and upon a bill filed to prevent the continued and unauthorized use of the audience room for the Sunday schools, this court, overruling the court below, granted an injunction. The distinction taken in that case, between "Divine service" and Sabbath school services was manifestly proper. Says AGNEW, J., "That prayer and praise, and indeed, oral as well as written instruction in religious matters by laymen, are used in Sunday school service is true, and in a general sense it may be said to be Divine service. * * * But in its more restricted sense it is used to signify acts of religious worship." In view of the contract between the two churches, the term was confined to its restricted sense. In the case in hand, the act of assembly uses the words "religious purposes," a term of much wider meaning, and clearly embracing Sabbath schools and the ordinary lecture services of a church. Nor do we think it detracts from the character of the occupancy of the building, that it is proposed to use the lecture room occasionally for social gatherings incident to the church, for societies for benevolent objects, and for fairs held by the ladies to raise funds for missionary work; nor that it is proposed to sometimes furnish a "plain tea" to those members who attend evening service from a distance. The body needs food as well as the soul. If the church requires the building for its Sabbath schools and for a lecture room, and such purposes are religious in their nature, as we have endeavored to show, of what possible matter can it be should the church utilize said building by applying it to other collateral objects, not in themselves technically religious, yet germane to the general purpose. And if by such means an income is derived therefrom, there is no violation of either law or morals. We think the case of the petitioners is clearly within the purview of the act of assembly.

The question whether there was any necessity for the proposed encroachment upon the graves of the dead is not legitimately be-

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fore us. It might or might not have been avoided by purchasing another lot for building purposes. The act of assembly refers this question to the congregation, and they have decided it adversely to the plaintiffs. We see nothing upon the record to justify us in revising their discretion.

The remaining question is one of power. The church having granted the privilege of interment in its grounds to certain persons, it is contended that as against the corporation such persons have a right to have the bodies remain undisturbed. In other words, that they had certain rights of property in said burial ground which could not be taken away except for public purposes, and upon making compensation therefor; and that the said act of April 18th, 1877, was transgressive of art. 1, § 17, of the Constitution, which prohibits the legislature from passing any law impairing the obligation of a contract.

Neither of the plaintiffs has such a standing in court as entitles him to raise this question. The plaintiff, Isaac Craig, excepts to the proceedings in the court below as "a pew-holder and member of the First Presbyterian Church of Pittsburgh," and the plaintiff, John B. Guthrie, joins in said exceptions as one "who has relatives, including two children, buried in the ground proposed to be taken by said church for its new buildings." Beyond this meagre statement there is nothing to show any contract relation between the plaintiffs and the church. The record does not show, nor does Mr. Craig allege, that he has buried any dead in the grounds, or that he has any right to do so. Mr. Guthrie alleges that he has relatives buried there, but in no part of the record does he show that he has any rights of sepulture in said grounds or any contract relation with the church.

We might well stop here. As, however, this point was argued on its merits, both below and in this court, we will consider it as if properly before us.

The ground in controversy was a gift from the Penns. It was conveyed by John Penn and John Penn, Jr., to the trustees of the Presbyterian congregation of Pittsburgh, by deed, dated September 24th, 1787. The church was incorporated five days thereafter, to wit, on the 29th of September, 1787. The ground conveyed to the church by the Penns was originally the western half of an old public burying ground, used as a place of interment for a period of thirty-five years before the Penns conveyed it to the church. The

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French used the ground as a place of sepulture from 1753 to 1758, whilst they held Fort Duquesne. Here they buried Beaujeux, the commander of the French and Indians at Braddock's defeat, July 9th, 1755. Afterward, the ground was used for the same purpose by the British and Colonial troops, stationed at Fort Pitt, and subsequently by the American troops, during the Revolutionary war. It was also used by the inhabitants from the first settlement of the country. (*Vide* testimony of Isaac Craig.) In the course of time the ground became so densely populated with dead bodies that it was scarcely possible to open a new grave without disturbing the remains of some one previously interred, and in 1848 or 1849 interments there ceased altogether, and its further use as a place of burial was abandoned. It was under such circumstances that the church petitioned the court for authority to remove the remains, under the act of 18th April, 1877.

We have no accurate information as to the precise nature of the relations between the church and those privileged to bury in its grounds. It does not appear that any of them had any right to or title in the soil, nor any right of sepulture in any particular lot or place in the yard. We have nothing in this entire record upon this subject except the statement of Robert Dalzell. He says in his cross-examination: "My impression is that pew-owners were entitled to burial without paying any thing for the ground. There was a book which showed all orders for interments of pew-owners and others; that book has been lost. I think that all persons, except pew-owners, paid for the privilege of burying in the church-yard, unless it was the poor of the church, and as to them I am not sure." The most that can be made of this is that the church granted a mere license or privilege to inter in its ground. To pew-holders it appears to have been granted without cost — to strangers upon a consideration. What rights does such a license confer upon the grantee? The answer is clearly given by Mr. Justice SHARSWOOD in *Kincaid's Appeal*, 16 P. F. Smith, 420; s. c., 5 Am. Rep. 377: "We hold that it was the grant of a mere license or privilege to make interments in the lots described, exclusively of others, as long as the ground should remain 'the burying ground of the church.' Whenever by lawful authority it should cease to be a burying ground, his right and property would cease. The lot-holder purchased a license — nothing more — irrevocable as long as the place continued a burying ground, but

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giving no title to the soil. While the license continued, he could perhaps bring trespass or case for any invasion or disturbance of it, whether by the grantors or by strangers. But if in the course of time it should become necessary to vacate the ground as a burying ground, all that he could claim, either in law or equity, would be that he should have due notice, and the opportunity afforded him of removing the bodies and monuments to some other place of his own selection, or that on his failing to do so such removal should be made by others. He accepted this grant or license subject to this necessary condition." Justice SHARSWOOD cites a number of authorities which fully sustain his position, and also discusses at some length the rights of pew-owners in churches, which bear a close analogy to the case of rights of sepulture. The principle deducible from the numerous authorities cited is that "the grant of a pew in a church edifice in perpetuity does not give to the pew-owner an absolute right of property as in a grant of land in fee. He has a limited usufructuary right only. He must be presumed, from the very nature of the subject-matter, to have taken the grant under all the conditions and limitations incident to such property." The same doctrine was held by this court in *Church v. Wells' Ex'rs*, 12 Harris, 249; says LOWRIE, J.: "A pew right is not of such a character as to prevent an absolute sale of the church edifice either by contract or judicial process; by itself it was never known as a subject of taxation; if the edifice burns down the pew right is gone; it does not prevent the society from tearing down and rebuilding the edifice, or from altering the whole interior arrangement of it; it does not authorize the pew-holder to change and decorate the pew according to his fancy, or to cut it down and carry it away; and it gives him no right to the ground on which it stands. It is therefore a right that is entirely peculiar."

The right of the legislature to authorize the removal of the remains of the dead from cemeteries is well settled. So it may delegate such power to municipalities. It is a police power necessary to the public health and comfort. *Kincaid's Appeal*, *supra*. The founders of our cities had perhaps but a faint idea of their future growth. Nor did they, probably, at that early day, realize the sanitary evils attendant upon the interment of dead bodies in crowded cities. I notice in a recent paper a statement from an eminent surgeon of the city of Philadelphia, that a dead body requires a period

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of from fifty to one hundred and fifty years for its entire decomposition. During all that time the air and the sources of water supply are, to a greater or less extent, affected by the noxious gases connected with such decomposition.

The graves of the dead may not be disturbed from mere wantonness. To do so is a misdemeanor and indictable both at common law and under the statute as an offense "highly indecent and *contra bonos mores*." Conceding, however, the right of the legislature to authorize such removal by virtue of its police power, the exercise of such power is not to be interfered with or denied because accompanied with some incidental benefit to the society or church in whose interest such power is invoked. It was competent for the legislature to have passed an act merely authorizing the removal of the remains from this burial ground. That the ground thus to be vacated is to be utilized by the church by the erection of a building for Sunday school purposes and a lecture room neither vitiates the act nor inflicts a wrong upon any human being, living or dead.

Speaking for myself, I have no doubt of the power of the trustees, under the deed from the Penns, and the charter of the church, to remove the remains with the consent of the congregation. I regard the application to the court, under the act of 1877, as wholly unnecessary. Be that as it may the power of the legislature to authorize such removal is beyond doubt.

I have considered the law of this case, not its sentiment. Mere sentiment, not based upon rights of persons or property, is not of value in a judicial proceeding.

We have been unable to find any serious error in this record. The proceedings therefore are affirmed.

Judgment affirmed.

AGNEW, C. J., dissented.

NOTE BY THE REPORTER.—In this case AGNEW, C. J., gave the following dissenting opinion:

"I cannot assent to the decision in this case. In my judgment it offends against natural feeling and constitutional law. I grant the right of the State, in the exercise of her police power, to regulate graveyards for the public good, and to remove decaying remains for the preservation of the health of the citizens. I grant her right of removal by way of eminent domain, when a great public interest requires it, but on compensation to those who have acquired a right of sepulture by contract. Yet even in this respect, the State has shown her sense of propriety and right in the general railroad law of 1849, § 12, by excepting burial places from the powers of a company to appropriate lands. But I deny the right of removal for individual or private interest, whether it be for building a lecture room for a church congregation or a Sabbath school room. Its purpose is to save money by

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taking ground appropriated for the dead. A religious congregation is a private body, and its interests are individual, not public. Thus to coin money out of the bones of the dead is to violate a purchaser's right of sepulture, contrary to the instincts of the race and the keenest sensibilities of the heart.

Among all tribes and nations, savage and civilized, the resting places of the dead are regarded as sacred. There memory loves to linger and plant the choicest flowers; there the sorrowing heart renews the past, rekindles into life the viewless forms of the dead, revives the scenes where once they moved, and recalls the happy hours of love and friendship. There parent and child, husband and wife, relatives and friends, with broken spirits and crushed hopes, revisit often the spot where they deposited their dead. Who does not feel the fountains of his heart broken up and the warm gushings of emotion, when standing over the green sod which covers the departed. Wherever the simple stone is placed, or the marble monument is reared, spontaneous thought inscribes upon it 'sacred to the memory.'

This sacredness is evidenced by one of the most touching incidents of scripture. When Abraham, standing by the dead body of Sarah, addressed the sons of Heth, saying, 'I am a stranger and sojourner with you, give me a possession of a burying place with you, that I may bury my dead out of my sight.' They offered him a choice of their sepulchres; but Abraham, intent upon a possession of his own, where the remains of her he had loved might repose in security, purchased the field of Macpelah of Ephron, the Hittite, for four hundred shekels of silver. Even more touching is the reference to Jacob, who, dying in Egypt, surrounded by his children, charged them and said unto them, 'I am to be gathered unto my people, bury me with my fathers in the cave that is in the field of Macpelah.' There they buried Abraham and Sarah, his wife, there they buried Isaac and Rebecca, his wife, and there I buried Leah.' Tradition has preserved to this day the identity of the cave and the tombs of those ancient worthies, undisturbed even by the Moslem, whose mosque covers and protects their resting places.

The man who violates the homes of the dead, who erases the tablets by which affection records their lowly dwelling, is lost to natural feeling and does an act which harrows the heart and excites mankind to rage. The law seizes hold of him for condign punishment; Act 31 March, 1860, § 47. At common law it was a misdemeanor and indictable as an offense 'highly indecent and *contra bonos mores*.' *King v. Lynn*, 2 T. R. 733; *Commonwealth v. Cooley*, 10 Pick. 37. The law enacts no new standard, but follows only the natural impulses of the race. Even now this common instinct is swelling in united chorus from the Atlantic to the Pacific, in the voice of the press, over the robbery of the grave of Stewart. But a few short months ago, it thundered over the desecrated tomb of Harrison. And are we now to say that the desecration of scores of graves to save money to a congregation is according to law?

In my judgment it is equally against the constitutional inviolability of contracts. Can a private association, corporate or unincorporate, sell a right of sepulture to-day, and to-morrow or next year retake the ground for a lecture or a school room? It is immaterial whether a grant of sepulture confers an estate or a privilege; it is a purchased right founded in contract, which no law can violate except for a public necessity. They who advocate this violation of nature and of the sanctity of contracts by calling it a mere privilege, assert its application to green graves as well as moss covered tablets. This is the necessary and logical result of their argument, for *quod* stops not even when the mourners are bending over the freshly-filled earth. The power to do it to-day is the same power which must do it to-morrow or years hence. Let it be a privilege, and this is the entire scope of the argument founded on *Kincaid's* case, 16 P. F. Smith, 412; s. c., 5 Am. Rep. 377, yet it is a right also paid for by the legal representatives of the deceased. What law can take it away for a private purpose?

It has no analogy to the privilege of a pew and cannot fall with the building. Its occupancy is permanent, not like that of a pew, periodical and temporary. If the building fall, is burned, destroyed or rebuilt, the pew right falls with it. But the purchased grave has no such necessary and intrinsic weakness of title. There the body is laid away, according to the rites of Christian burial, and in the acts of Christian faith, to await the resurrection morn, when its dust, reanimated by the Creator's call, shall rise to meet the Lord. Then why should a Christian congregation violate instinct and law, on the ground of

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privilege? Poverty is the plea, but such a plea would better defend a larceny of bread to feed famished children. But can poverty sanctify this disturbance of the bones of the dead? The principles stated in *Kincaid's* case go the length of my conclusions. The opinion there states that owing to its neglected condition, the graveyard was rapidly becoming a 'nuisance' to the neighborhood. It is also admitted that if a congregation, from mere motives of convenience or ornament, resolve to pull down the old and erect a new church edifice, in such case the pew-holder is entitled to compensation. In *Kincaid's* case, the law provided that the proceeds of the sale should first pay the expenses of removal, including the cost of new lots, and in the second should compensate lot-holders before any division of the funds. In this case, there is no provision for compensation. It is said also in the opinion: 'But when it is an act of necessity required by the condition of the building or other imperative exigency, he (the pew-holder) has no claim whatever to compensation.' For this many cases are cited. But what necessity or exigency exists in this case? None whatever. The purpose is to raise money to build a lecture and Sunday school room, a mere improvement which the congregation ought to pay for itself. It has no analogy whatever to the case of a pew-holder whose privilege falls by the destruction of the building of which it is a part. This is a contract privilege not dependent on a building. If I buy the privilege of running water, or a right of way, or a right to open my windows over my neighbor's yard, what law justifies its violation? It is a right secured by contract, which the Constitution protects, here a right made sacred by those instincts of nature, which precede constitutions, and imprint upon them the highest obligations of mankind to each other." See *Mount Moriah Cemetery Association v. Commonwealth*, 8 Penn. St. 235; s. c., 23 Am. Rep. 743; *Town of Lake View v. Ross Hill Cemetery Co.*, 70 Ill. 191; s. c., 29 Am. Rep. 71; *Kincaid's Appeal*, 66 Penn. St. 411; s. c., 5 Am. Rep. 37; *Trustees of First Evangelical Church v. Walsh*, 57 Ill. 363; s. c., 11 Am. Rep. 21; *Evergreen Cemetery Association v. City of New Haven*, 43 Conn. 234; s. c., 21 Am. Rep. 643; *Barks v. Wall*, 29 La. Ann. 38; s. c., 29 Am. Rep. 318.

Washburn (Real Property) says: "Of the same character is the right of burial in a public burying ground. It is not a property in the soil nor to compensation for the same, if upon the ground having ceased to be used for burial purposes, the friends of the person buried therein are required to remove the remains." And (Easements and Servitudes), "Rights of burial in churchyards and pew rights in churches, although acquired by deed of a particular lot or pew, are only easements in land belonging to the religious society which owns the church and churchyard. It is an easement in, not a title to a freehold, and is to be understood as granted and taken, subject with compensation of course, to such changes as the altered circumstances of the congregation or the neighborhood may render necessary."

In *Bryan v. Whistler*, 8 B. & C. 283, the plaintiff had paid 20*l.* to the rector of a church for permission to erect therein, for his exclusive use, a vault, with a tablet above it. The rector gave him a receipt silent as to the plaintiff's exclusive use of the vault. The plaintiff afterward built the vault and made an interment therein. Subsequently the rector opened the vault and placed another body in it, whereupon the plaintiff brought an action on the case. The defense was that the plaintiff had no such interest in the vault as would enable him to maintain the action, because there was no conveyance or other instrument, vesting in him the exclusive right to the vault. The King's Bench, entering a nonsuit, said: "No memorandum was in this instance signed, except the receipt. If it be not an interest in land, it is an easement, or the grant of an incorporeal hereditament, which could only be effectually granted by deed, and no such instrument was executed." * * * But whether the grant were for a special purpose, or general for all purposes, the right could not pass without deed or writing."

In *Widull v. German Reformed Church*, 4 Sandf. Ch. 471, the religious corporation became seized of the ground, and converted it to the purposes of a cemetery. The complainants had relatives interred therein. None of them had received deeds from the corporation, in which the whole title remained. After stating that the complainants could only in the character of corporators in the society owning the ground have any interest in the cemetery, or exercise control over it, the vice-chancellor says: "The only protection afforded to the remains of the dead interred in a cemetery of this description is by the public laws prohibiting their removal except on the prescribed terms, and in a still stronger public

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opinion. Probably these furnish all the protection which is consistent with the exigencies of a large city, the population of which increases with marvellous rapidity, and whose wants leave but little room for the remains of the dead in the dense and crowded haunts and thoroughfares of the living." As to a permit or license to enter, he adds: "It confers the privilege of sepulture for such body, in the mode used and permitted by the corporation, and the right to have the same undisturbed so long as the cemetery shall continue to be used as such, and so long also, if its use continue, as such remains shall require for entire decomposition, and also the right, in case the cemetery shall be sold for secular purposes, to have such remains removed and properly deposited in a new place of sepulture." He also takes occasion to say in another part of his opinion, that "Where vaults or burying-places have been conveyed by religious corporations, rights of property are conferred upon the purchasers."

In *Brick Presbyterian Church*, 3 Edw. 155, a petition was filed for the sale of the church and churchyard, to which a number of pew-holders and vault-owners, the latter claiming under deeds, objected. The petition was dismissed, the vice-chancellor observing: "The intention obviously was, to sell and dispose of the land, and not to grant a mere temporary use or privilege to construct vaults in the land, with a reserve of the title to the church. It was a grant of the land itself, such as passed the title to the purchasers or lessees. And hence the form of the conveyances describing each lot or parcel by metes and bounds, with all the apt words generally used to pass the title to the land." * * * This view of the case renders it unnecessary to examine into the expediency or propriety of the proposed sale and removal of the church. If the petitioners have not the right without obtaining the consent of the vault-holders, then it cannot be done, however much it may be desired by a large portion of the congregation.

In *Richards v. Northwest Protestant Dutch Church*, 32 Barb. 42, an injunction was applied for by the representatives of the original grantees of a lot in the churchyard, to restrain the officers of the church from removing remains and destroying the vault. In denying the complainant's right to the relief asked for, the court said: "The right of burial, it seems to me, when confined to a churchyard, as distinguished from a separate, independent cemetery, although conveyed with the common formalities of 'heirs and assigns for ever,' must stand upon the same footing as the right of public worship in a particular pew of the consecrated edifice. It is an easement in and not a title to the freehold, and must be understood as granted and taken, subject (with compensation of course) to such changes as the altered circumstances of the congregation or the neighborhood may render necessary. * * * Like the sale of a church pew, which gives the mere right to worship in the particular place while the church stands and is occupied for religious purposes, the sale of a church vault gives, it would seem, the mere right of interment in the particular plot of ground, so long as that and the contiguous ground continues to be occupied as a churchyard. The owner of the easement may be, in case of disturbance, and no doubt is, entitled to a reasonable compensation or equivalent; but he cannot interpose a veto to the disposition of the soil, should the court, as was actually the case in this instance, on application of the legitimate church officers, deem such disposition proper and order it accordingly." This case it will be seen is adverse to that in 3 Edw.

In *Sohler v. Trinity Church*, 109 Mass. 21, it was held that owners of tombs in the church building of a religious society have no title in the land, but only an interest in the structures and in their proper use, and cannot prevent a sale of the land and building by the society, nor the removal of the remains from the tombs, when such removal is in other respects conducted according to law; as for instance when the legislature has directed it in the exercise of its powers in relation to the public health; and the court remarked that "rights of burial under churches or in public burial grounds are peculiar, and are not very dissimilar to rights in pews. They are so far public that private interests in them are subject to the control of the public authorities having charge of public regulations."

In *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 503, it was held that the association and not the lot-owners were taxable for the land. The court said: "The effect of such conveyances, under the statute from which the plaintiff derives its powers, is, we suppose (for no copy of any conveyance is laid before us), no more than to confer upon the holder of a lot a right to use it for the purposes of interments. No such estate is granted as makes him an owner in such sense as to exclude the general proprietorship of the association.

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The association remains the owner in general, and holds that relation to the public and to the government; while subject to this, the individual has a right exclusive of any other person to bury upon the subdivided plat assigned to him. He holds a position analogous to that of a pew-holder in a house for public worship."

In *Partridge v. First Independent Church of Baltimore*, 39 Md. 631, the appellee had purchased in fee a parcel of land for a burial ground, and it was used for many years for that purpose. The persons from whom the appellants had derived the lot in question had purchased the same from the appellee and had acquired a certificate therefor in the form issued to lot-holders by the appellee, which was neither sealed, acknowledged nor recorded, but professed to convey a certain designated lot to the party, his heirs and assigns for ever, subject to the regulations of the church trustees. It was simply signed by the chairman of the trustees, and attested by the register. The purchaser had constructed an expensive vault, in which he had interred different members of his family. The burial ground having ceased to be suitable for such purpose, the appellee filed a bill against the lot-holders for a sale thereof, and trustees were accordingly appointed to sell the same, and were directed by the decree to see that the remains of all persons interred therein were removed, and decently reinterred elsewhere at the cost of the church corporation, except where parties interested desired to do so themselves, in which case they were to bear any excess in the cost attending such removal. The trustees faithfully performed their duties. Months before the filing of the bill, the appellants had removed their dead, leaving the empty vault, which the trustees reserved from the sale, with the right to remove the same from the premises. The appellee was ready and willing to pay to the appellants the sums paid for their lot, but they claimed out of the proceeds of the sale such sum as would enable them to construct elsewhere a vault similar to the one they had built in the cemetery of the appellee, and filed a petition praying the allowance of said sum. The court, after reciting the facts, and stating that the certificate was neither under the seal of the corporation, nor acknowledged, nor recorded, in affirming the decree, say: "We think it clear that it conferred no title or estate in the soil, nor could it operate as a grant of an easement, because it was not under seal, nor was it acknowledged and recorded, so as to be effective to convey such an interest. The right to an easement must be founded upon a grant by deed, or upon presumption, for it is a permanent interest in another's land, with a right of enjoyment; whereas a mere license is but an authority to do a particular act or series of acts upon another's land, without possessing any estate therein. At most, then, the certificate, such as we have here, conferred only a privilege or license to make interments in the lot described, exclusively of others, as long as the ground remained a burying ground or cemetery. Whenever, therefore, by lawful authority, the ground ceased to be a place of burial, the lot-holder's right and privilege ceased, except for the purpose of removing the remains previously buried." The court then refer with approval to *Kissaid's Appeal*, 86 Penn. St. 411, and passing to the second question, which was to whether the lot-holder is entitled to compensation or reimbursement, out of the proceeds of the sale of the burying ground, for improvements or erections placed on the lot, says:

"We are not aware of any principle upon which this claim can be allowed. There can be no application to this case of the principles upon which beneficial improvements are allowed for, nor is the nature of the privilege, evidenced by the certificate, such as to entitle the holder to any distributive proportion of the proceeds of the sale of the estate itself. The most that the lot-holders could claim to receive is the price paid by them for the license. If the interest was in the estate, then they would be entitled to distribution according to that interest; but as they had no interest in the estate, and only an authority to do certain acts on the land, they can claim no part of the proceeds of sale, as being the equivalent of any interest therein. * * * All monuments and erections capable of being removed, placed on the burial lots under a license like the present, would be regarded as the personal property of the lot-holder; and he would have the right to remove the same, upon the lot ceasing to be used for the purpose of burial. * * * To the assertion of this right the lot-holders must resort, instead of claiming compensation for the cost of the erection or improvement."

Mr. Wm. C. Schley, in an article on this subject, in 19 Am. Law. Reg. 63, says, in speaking of the owners of lots in independent cemeteries, "it would seem" they "would possess fee simple titles, and could exercise rights of ownership and control over the same,

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consistent with the purposes for which said lots were sold, in as full a manner as over any other real property of which they might hold the absolute title."

In the *Coppers'* burial case arising in the city of New York, the General Term of the First Department reversed the judgment of Justice WESTBROOK awarding *mandamus* to compel the cemetery authorities to permit the interment of Coppers. Coppers purchased a lot in Calvary Cemetery, an independent cemetery, in 1873, paying \$75 and taking a receipt for it, and buried several of his family in it. The cemetery is owned and controlled by the trustees of St. Patrick's Roman Catholic Cathedral, and one of the rules of the church and by-laws of the cemetery is that no protestant or free mason shall be buried in that consecrated soil, but there was no restriction in Coppers' receipt. Mr. Coppers himself died a mason and a protestant, and the trustees stopped the funeral procession at the gates, and refused to allow his remains to be interred there. The persons in charge of the grounds, however, had dug the grave and received seven dollars for it, and the authorities did not offer to return that money. The body was placed in the receiving vault, whence the trustees threatened to remove it. An injunction to prevent this was obtained, and a *mandamus* was applied for to compel the trustees to allow the burial. Justice WESTBROOK granted the writ. The only evidence of title held by Coppers, however, was a receipt signed by the superintendent of the cemetery, unsealed, acknowledging payment of \$75, "being the amount of purchase-money of a plot of ground, eight feet by eight feet, in Calvary Cemetery." The court hold that the receipt did not convey a fee simple title, and that under the statute he acquired no estate or interest in the land; that the receipt did not amount to a contract; that the only right acquired was that of burial and use in conformity with the rules of the association; and that the regulation in question was not unlawful. Judge BARRETT, who delivers the prevailing opinion, also holds that the relators have no *status*, being neither legal representatives, next of kin, nor assigns, but were strangers to the alleged contract. DAVIS, P. J., remarks: "If I were called upon, in this case of Dennis Coppers, to criticise the good sense and reason of the rules, I should certainly differ from the appellants, for I can see no good reason why the fact, that Coppers was in his life a free mason should prevent the burial of his body, after death had separated him from all such societies, by the side of his wife and children. It may have been a harsh and uncharitable thing to have done; but the law is not changed because the consequences of upholding it seem severe or cruel. The religious corporation owning the cemetery have seen fit to make the rule. The purchaser took his rights subject to it." In *Mordant v. Richardson*, 22 Leav. 583, persons had purchased family graves in perpetuity in a private burying ground, which was afterward closed by order of the Queen in council. There was no formal grant executed, and their title was merely evidenced by a receipt for the purchase-money, stating that the "grave is now sold in perpetuity." *Held*, that they were entitled to an injunction restraining the trustees from removing or injuring the graves or gravestones.

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(38 Penn. St. 137.)

Criminal law — misdemeanor — evasion of statute.

The defendant was indicted under a statute making it a misdemeanor to employ female waiters in a drinking saloon. She had employed such waiters before the passage of the act, and after the enactment she discharged them and entered into partnership with them. *Held*, an evasion of the statute for which the indictment would lie. (*See note*, p. 433.)

CONVICTION of misdemeanor under the following statute: "An act relative to the employment of females in hotels, taverns, saloons and eating-houses, or other places, for the sale of intoxicating and other drinks, and the penalty for the violation thereof. SECTION 1. Be it enacted, etc., that it shall not be lawful for any owner, proprietor, keeper or agent of any hotel, tavern, saloon or eating-house, or other places where intoxicating liquors are sold, to employ or permit the employment of any female at any such hotel, tavern, saloon or eating-house, to sell, vend, offer, procure, furnish or distribute any intoxicating drinks or any admixture thereof, ale, wine, beer or cider, to any person or persons, or to employ any female as lady conversationalist, or for the purpose of attracting persons to such places, or to permit the assembling of females at such places as aforesaid, for the purpose of enticing customers or making assignations for improper purposes. Nor shall it be lawful for any female not having a license, as permitted by the laws of this Commonwealth for the sale of intoxicating liquors, to sell at any hotel, tavern, eating-house or saloon, offer, procure, furnish or distribute any intoxicating drinks or any admixture thereof, ale, beer, wine or cider, to any person or persons; provided that nothing in this act shall be so construed as to prevent the wife or daughter of any person having a license for selling or distributing aforesaid liquors.

"SEC. 2. Any person violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction of the same, shall be sentenced to pay a fine of not less than one hundred dollars nor more than five hundred dollars for each and every female so employed, or undergo an imprisonment of not less than three months or more than one year, or either or both, at the discretion of the court having jurisdiction of the case.

"SEC. 3. That from and after the passage of this act, no license for the sale of intoxicating liquors shall be granted to any person or persons, except upon the express condition that the person or persons so licensed shall and will not employ any female or females, as provided in the first section hereof, and any person or persons so licensed shall, upon conviction for violating the provisions hereof, in addition to the penalties provided in the second section, forfeit his, her or their license."

Thomas M. Marshall and A. M. Brown, for plaintiff in error.

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The act of March 28th, 1878, is penal, and should be interpreted strictly. The act does not forbid females who are proprietors or keepers of licensed taverns from engaging in the management of work incident to such establishments. Fanny Walter & Co. were such, and engaged in the performance of their own legitimate work. They had no female employees; all were engaged in the management of their own business. An indictment was preferred against Fanny Walter alone, charging her with misdemeanor, in that she had employed certain females, to wit, her copartners and coproprietors, at the tavern kept by the firm, "to sell, vend, procure, furnish and distribute intoxicating drinks," etc. The answer to this charge was that the females named were not employees but owners, proprietors and keepers, engaged with her in carrying on their own business, under a license duly granted by the Commonwealth. The truth of this answer was not and could not be questioned. The license was a matter of record. If one partner could be convicted, all could be separately indicted and convicted.

PAXSON, J. The plaintiff in error was indicted and convicted of a violation of the act of 28th of March, 1878, entitled "An act relative to the employment of females in hotels, taverns, saloons and eating-houses or other places for the sale of intoxicating and other drinks, and the penalty for violation thereof." Pamph. L. 9. We learn from "the history of the case" that Fanny Walter, the plaintiff in error, for a considerable time prior to the 28th day of March, 1878, had been the keeper of a licensed tavern on Diamond street, in the city of Pittsburgh, and had in her employ in conducting the establishment a number of females. Upon the passage of said act she discharged her female employees. On the next day, 29th of March, 1878, in pursuance of a previous arrangement, she entered into articles of copartnership with eight of the employees, discharged the previous day, for the purpose of conducting the same business at the place then and previously occupied by her, under the name of Fanny Walter & Co. On the same day a tavern license was duly granted and issued to said firm for the said house on Diamond street, and subsequently, in May, 1878, another license was duly granted to the firm for one year from the termination of the first license. On the 10th of April, 1878, the said Fanny Walter was arrested and bound over for her appearance in the Quarter Sessions to answer the charge of violating the act of assembly

aforesaid. A true bill was found by the grand jury at the March sessions, and in the month of June last she was tried, convicted and sentenced to pay a fine of \$800.

The assignments of error, from one to five inclusive, relate to the rulings of the court upon the law, and may be considered together. The learned judge charged the jury that if they believed "that Fanny Walter, the defendant, was sole lessee of the premises occupied by her on Diamond street at the time this article of partnership was made and entered into, then she was the proprietor, owner or keeper of this saloon or eating-house, and if so, then if she did afterward employ or permit these so-called partners to sell, offer or furnish beer, wine or cider, to any person or persons on the premises or within the saloon, then she is guilty under the act of assembly, and it is no defense that she may have done so by reason of a supposed or an actual partnership, such as that offered in evidence. To allow one who is proprietor, lessee or owner of a saloon, whether male or female, to take under the cloak of partnership, even an actual one as between the parties themselves, one or more females into his concern for the purpose of distributing drinks, would be in direct violation of the very language of the act, and is, in my opinion, a criminal offense."

We are unable to see any error in this ruling. The plaintiff in error was the proprietor or keeper of this saloon when the act was passed. By its terms she was prohibited from employing or permitting the employment of any female at such saloon, to "sell, vend, offer, procure, furnish or distribute any intoxicating drinks or admixture thereof, ale, wine, beer or cider, to any person or persons." For the purpose of avoiding the penalties prescribed in the act she discharged her female employees, and the next day, in pursuance of a previously formed design, entered into articles of copartnership with them, and the business is then carried on as before. In what respect were the relations of the parties changed by this copartnership? The articles provided that: "The said Fanny Walter shall furnish all the capital, stock, premises, supplies and materials for carrying on the said business, and shall also be the business manager of the firm; shall keep the books, receive all moneys, pay all bills and expenses, and make all contracts and purchases for carrying on the business of said firm." It was further provided that each of the said eight females should receive one-twentieth of the profits, and bear an equal proportion of the losses.

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The effect of this is, that the plaintiff in error retains the entire control of the business as she had before. The capital, stock and premises still belonged to her. Her new partners put in nothing and get nothing beyond a share of the profits by way of compensation. A more palpable evasion of the law could not well be devised. [Omitting minor points.]

Judgment affirmed.

NOTE BY THE REPORTER.—The excise laws have been a fruitful source of attempts at evasion. Thus in *Rickart v. People*, 79 Ill. 83, an association was formed for the avowed purpose of promoting temperance, friendship, etc. They claimed to have bought the dram shop of one of their members, who was elected their treasurer, and who continued in the possession of the dram shop, having no license to sell intoxicating liquors. Each member was required to pay \$1, for which he received a ticket, with the numbers from 1 to 20 inclusive upon it, and, upon presenting this ticket at the bar, the member received liquors or cigars, as he wished, and paid for the same by having numbers punched out of his ticket, each number representing five cents. Any person could become a member by paying \$1. The treasurer received all the money, and rendered no account to the other members. He also bought all liquors and cigars. *Held*, that the jury was warranted in finding that this was but a device to evade the law, and that the treasurer was guilty of unlawfully selling intoxicating liquors. In such case, if the liquors really belonged to the association, and the treasurer acted for them, then all the members would be guilty of unlawfully selling, as the liquor would be partnership stock, and the company would have no more right to sell to the individual members, or partner, than a stranger would. The court said:

"Any person, it appears, could become a member of the association simply by buying a ticket. The witness, whose testimony we have before cited, says, 'that he supposed a person might join the club, call for a glass of beer, get it, have his ticket punched and then offer back his ticket and demand the balance of the money paid in by him, get it and cease to be a member of the club.' It is added, however, nothing of the kind had ever occurred, but the witness states he had known an instance of a person, who was not a member, drinking beer that belonged to the club, in the club room. All this is plainly a device on the part of defendant and those who desire to patronize his bar, to avoid the provisions of the law, and to enable him to sell intoxicating liquors at retail, as he had formerly done, without first obtaining a license to keep a dram shop. The purpose and object is so transparent, that the subject need not be seriously discussed. The whole thing is a subtle artifice, planned with a view to avoid the penalties denounced against persons violating the law. The ticket arrangement was simply paying in advance and getting the liquors at convenient seasons, when desired. The proposition is absurd, that the ticket holders really owned the liquors with which the bar was stocked. Each party bought tickets, to be used at the bar when he wanted any thing, and for no other purpose. Should we adopt the theory of the defense, that the several ticket-holders, or parties constituting the association, in fact owned the liquors in the saloon, it would make no better case for defendant, and a vastly worse one for the parties associated with him. In that view, the liquors would belong to the company as partnership stock, and the company would have no more rightful authority to sell to the individual members, or partners at retail, without a license to keep a dram shop, than a mere stranger would have. Buying tickets, as we have seen, was simply buying twenty drinks and paying for them in advance. Each one paid for whatever he got, as he would have done had he bought of a licensed seller. It is preposterous to assume that a number of persons may, with impunity, associate themselves together as a firm, or voluntary company, purchase a quantity of liquors and retail them out to the several members as they would to strangers. Such an enterprise is unlawful, and all concerned would be guilty of violating the statute. If such a device could be tolerated, it would render all legislation on this subject nugatory. But the alleged association is a mere fiction. It is nothing but a device, under the guise of a co-partnership company, adopted to enable defendant to sell intoxicating liquors to whomsoever

ever might desire to buy at his counter, and to enable him to do so without taking out a license for that purpose, as the law requires. The real object of the parties engaged in the business was purposely concealed in the articles of association. Had it been an honest enterprise, there would have been nothing to conceal. It was adopted under legal advice, and is obviously nothing but a shift, or device, to evade the provisions of the law, and whatever liquors were either given away or sold for tickets under that arrangement, come within the definition of 'unlawful selling.' It was a question of fact whether the association was a mere shift or device to evade the provisions of the law, and the jury having found it was, we see no reason to be dissatisfied with the conclusion reached."

In *Marmont v. State*, 48 Ind. 21, a society or club of persons, having a treasurer and other officers, met every Sunday, and each person on becoming a member paid into the treasury a certain sum and monthly assessments thereafter, to form the basis of a fund to pay expenses and for relief, and the treasurer, by order of the club and for the club, on each Saturday evening purchased a keg of "lager beer," an intoxicating liquor, and placed it in the hall where the meetings were held, and on Sunday whenever a member desired a glass of beer he got it, drank it on the premises, and delivered to the treasurer five cents, which money was placed in the treasury to keep up the funds, pay expenses, and for relief for sickness and other mishaps to members. *Held*, that the delivery of a glass of the beer under such circumstances to a member of the club, and receiving five cents therefor by the treasurer, constituted a sale by the treasurer, as agent of the club, within the meaning of the statute prohibiting the sale of intoxicating liquor on Sunday. The court said:

"Under the arrangement as agreed upon, the keg of beer belonged to the society. The appellant was the agent of the society, and if he sold in violation of law he is liable to be convicted, in the same manner and upon the same principle as a bar-tender of a person who holds a permit under the statute in question is liable, who sells in violation of the statute. As the keg of beer when purchased belonged to the society, the question arises whether the society, by its agent, could make a valid sale of such beer to the persons composing such society. We know of no principle of law which prevents it. We know that it is the daily habit of partners to sell the firm property to the persons composing the firm, and quite frequently the members of the firm are permitted to purchase such goods or articles as they may need at cost.

"When a firm purchases, with partnership funds or upon credit, a sack of coffee or a barrel of sugar, the coffee or sugar belongs to the firm; but when a part of each is taken out and transferred to each member of the firm, either for cash or upon credit, a valid transfer has been effected from the firm to the individual members. So, while the beer was in the keg, it was the common property of the society, but when a portion was withdrawn and delivered to a member of the society, upon credit or for cash, the portion so withdrawn ceased to belong to the society and became the separate property of the member so receiving it, and the transaction invested him with the power to drink it himself, to give it away, to sell it, or to throw it away. But, says the learned counsel for appellant, there was no gain or profit to the appellant. It is not necessary that there should be gain or profit to him. It is sufficient if the sale or transfer inured to the benefit of his principal the society. It is agreed that each member, upon his initiation, paid fifty cents and thereafter a monthly assessment of ten cents, to form the basis of a fund for payment of expenses and reliefs of the society; and that the money received for each glass of beer drawn for and used by a member of said association goes into the society's treasury, to keep up its funds for payment of expenses, procuring refreshments, and for reliefs; which expenses are for fuel, rents of hall, newspapers, the beer used, and the donations or reliefs payable to each member of said association, who, from sickness or other mishaps, may require assistance; and a standing committee from the members of said society is appointed to see after and inquire into and direct the payment of necessary reliefs in all such cases. We are not informed what profits are realized from the sale of each keg of beer, but it must be considerable, or the proceeds would not be sufficient to pay expenses and furnish the necessary reliefs to the sick and unfortunate members of the society.

"When the society appointed the appellant its agent for the sale of its beer to the members of the association, it consented that each member might become the owner of such portion of the partnership property as he might be willing to pay for, and appropriate it

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to his individual use. If the transaction set out in the agreed statement of facts be not an evasion and violation of the law, then a number of persons may do that lawfully which if done by one person would be unlawful. It would be a reproach to the law and its administration, if a combination of persons could, by such an arrangement, evade the law and thwart the legislative will."

In *Commonwealth v. Smith*, 102 Mass. 144, the facts were as follows: "Several persons formed a club of which the defendant was a member; they advanced a certain sum of money each, which was put into a common fund; the defendant was chosen agent of the club, and under instructions of the club purchased liquors and refreshments for the club; the fund was taken by the defendant and invested for them, and a certain number of checks, of the amount of five cents each, were delivered to each member of the club, to the extent of the money advanced by each; these checks were transferable only to other members of the club; upon presentation of the checks by any member to the defendant, he would deliver to that member liquor of the club, to the amount of the check presented; on several occasions the defendant had delivered liquor to the witness, as such member, upon checks; upon distributing the liquor in the manner aforesaid, it was calculated that the liquor would so far overrun the amount to be delivered upon the checks, as to leave in undelivered liquor about twenty per cent of the original cost; and the defendant was to have this residue, to compensate him for his services as agent, and for the use of his room by the club.

"The presiding judge, in view of all the evidence, ruled that if the liquor in the defendant's possession was bought by him as agent of the club, and the liquor so purchased was that of the club, the members advancing the money to purchase the same, and if checks were distributed to each of the members according to the amount advanced by each, and the defendant was a member of the club, and delivered to each member upon presentation of such checks, from time to time, the amount of liquor represented by such checks, that would be a sale by the defendant."

The court say: "One of the rulings of the learned judge of the Superior Court, at the trial, appears, however, to have been erroneous. The arrangement described in the bill of exceptions for the formation of a club, the purchase of liquors with their joint funds, and their distribution among the members by the agency of the defendant, may have been a mere evasion of the law. Whether it was really so, however, was wholly a question of fact, to be passed upon by the jury, under proper instructions. The court was not warranted in assuming, as a matter of law, that it was necessarily an evasion, or that as a matter of law, the facts stated, to use the language of the presiding judge, 'would be a sale.' It certainly might happen, and not unfrequently has happened, that a number of persons unite in importing wines, or other liquors, from a foreign country, to be divided between them according to some agreed proportion. It could not seriously be contended that the person who should receive the liquor so imported, at his place of business, and make or superintend the division among the contributors to the purchase-money, is a seller of intoxicating liquors, or that they buy the liquors of him. It is difficult to see how it could make any difference that the liquors are of various kinds and were purchased in this country instead of being imported from abroad, or that the person who is to make the distribution delivers them in small quantities, and keeps his account by means of tickets or checks. If the liquors really belonged to the members of the club, and had been previously purchased by them, or on their account, of some person other than the defendant, and if he merely kept the liquors for them, and to be divided among them according to a previously arranged system, these facts would not justify the jury in finding that he kept and maintained a nuisance, within the meaning of the statute under which he is indicted. There would be neither selling, nor keeping for sale. On the other hand, if the whole arrangement were a mere evasion, and the substance of the transaction were a lending of money to the defendant, that he might buy intoxicating liquors to be afterward sold and charged to the associates, or if he was authorized to sell, or did sell, or keep any of the liquors with intent to sell, to any persons not members of the club, he might well be convicted. This, however, would be a question not of law but of fact, and would fall wholly within the province of the jury."

In *State v. Mercer*, 23 Iowa, 405, the facts were as follows: "From the evidence before us it appears that there existed an organization called the 'Winterset Social Club,' the

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object of which was to supply its members with intoxicating liquors, to be used as a beverage. The manner in which this club carried on its operations is not explained further than it is shown that defendant had possession of the liquors used, and sold tickets to members of the club, which were exchanged for or given in payment of intoxicating liquors in defendant's house by the members of the club presenting the tickets. The liquors were served out to the ticket-holders and members of the club by defendant. Persons became members by signing their names in some book (but what were the contents of the book does not appear) and by buying tickets."

Upon the trial, the defendant offered in evidence the articles of association of the club, but they were excluded. The court say: "The articles of association are not in the abridgment of the record before us. It is therefore not possible for us to determine that they were material and admissible as evidence. But if we are to consider that they were of the purport as claimed by the defendant's counsel in their argument, we must conclude that they were correctly excluded by the District Court. They appear, by the statement of counsel, to have been nothing more than the foundation of an organization, the object and intent of which was to evade the law for the suppression of intemperance, a rather clumsy device by which the defendant and the members of the 'Social Club' hoped to defeat that law and establish a place of resort where they could be supplied with intoxicating liquors for unlawful use. The fact that under the arrangement of selling tickets, the members of the club became the owners of the liquors to the extent of the money paid, does not make the sale of the liquors in that way lawful. The act of selling the tickets was the sale, in fact, of the liquors. It is confessed that such sales were for the purpose of supplying the liquors to the purchasers to be used as a beverage."

Defendant was licensed to sell beer "not to be drunk on the premises." The bar-keeper handed a mug of beer through an open window in the house to one standing on the highway, who there drank it, close to the window. Held, not a violation of the license. *Dool v. Schofield*, L. R., 3 Q. B. 8.

In *Areher v. State*, 45 Md. 33, the defendant, having no license to sell liquors, sold cigarettes, worth from a quarter to a half a cent each, for ten cents apiece, and then invited the purchasers to drink liquors with him. The court said: "There can be no question, that if the price asked for the cigarettes was intended to cover the price of the whisky, which was afterward nominally given to the purchasers, the transaction was a sale of the whisky, as well as of the cigarettes. Such an attempt to evade the law is a very shallow one, and testimony tending to show that this was the real character of the transaction was admissible to establish the offense for which the traverser was indicted."

As to the evasion of a statutory prohibition against the defendant's re-marrying, during the life of the successful plaintiff in a suit for absolute divorce by going to another State, where no such prohibition exists, for the express purpose of marrying, and there marrying, and then returning to this State, see note, 18 Am. Rep. 531.

The law against lotteries has given rise to many attempts at evasion. See *Holmes v. State*, 2 Tex. Ct. App. 610; s. c., 28 Am. Rep. 439 (the prize candy case), and note, 44.

The principle involved in this case has been extended even to colorable legislation designed to evade constitutional limitations and prohibitions. In *People ex rel. Bolton v. Albertson*, 55 N. Y. 50, a statute had been passed creating the Rensselaer police district, consisting of the city of Troy and some very small and unimportant fragments of territory from three adjacent towns, and appointing the officers thereof, thus depriving the inhabitants of the district of the power of appointing their own officers by the establishment of a new civil division. It was held this legislation was a colorable evasion of the Constitution; that when the only object of legislation is to give the benefit of a city police to an inconsiderable strip of territory contiguous to a city, there is no necessity for a new civil division, as the end may be accomplished by enlarging the bounds of a city, and there being no necessity, such an organization is unconstitutional; and that the act was unconstitutional and void, inasmuch as the main object of the act was the establishment of a police force under a new organization for the city of Troy, and the fragments of territory outside of the city limits were included merely to give the territory the name and form of a police district, as distinct from the ordinary civil divisions of the State; and because, if it was deemed necessary to extend the police jurisdiction over those fragments, they should be incorporated in and made a part of the city. The court said:

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"The proposed district is constituted by annexing to or uniting with the city of Troy three small patches of territory — one on the east, a part of the town of Brunswick, principally, as is stated in one of the affidavits, agricultural lands, and containing in all between 500 and 600 acres of land, and on which there are, by count, sixty-nine dwelling-houses of all descriptions : one on the south, a part of the town of North Greenbush, containing about four acres of land, with a single dwelling-house thereon, and projecting, as annexed, in a triangular shape from the southern boundary of the city ; and on the west a small island in the Hudson river, and within the bounds of Albany county, containing about a dozen acres of land, having thereon one foundry, or manufactory of machinery and engines, and a row of tenant-houses, with ten front doors, calculated for twenty families. The entire territory was less than a mile square in extent, but no part of it was within the boundaries of an incorporated city or village, or had ever had or required, so far as appears, any police organization or force, other than such as is common to every town in the State.

"It is possible that these tracts adjacent to the city of Troy, and in many ways connected with it by the business relations and associations of the dwellers therein, might very properly be incorporated into and made a part of the city of Troy, by the enlargement of its boundaries so as to embrace the entire territory. There is certainly no impediment to such an extension of the city limits, and perhaps there may be a necessity for it. In substance and effect, the act does enlarge the boundaries of the city for certain purposes, while for all other purposes, the former city and town organizations and relations are suffered to remain intact. That this is so, and that instead of providing for the organization of a new civil division, the different portions of which have a common interest, and are so situated as to demand a common defensive and protective force, and which is impossible or impracticable to bring under one government, for all purposes, the act has for its chief and main object the establishment of a police force, under a new organization, for the city of Troy, and that the other fragments of territory were included merely to give the territory the name and form of a police district, as distinct from the ordinary civil division of the State, and not to give them any substantial or necessary benefit of a police, will be readily seen by a brief reference to some of the prominent and most important parts of the act itself.

"No one can read the act without being convinced that the city of Troy was its objective point, and that its sole purpose and its sole effect is to provide a substitute for the police organization of that city, and to confer upon persons, to be appointed other than by the electors or some authority of the city, the duties and emoluments of office before then exercised and enjoyed by city officials and by officers of the county of Renaselaer.

"There is an absence of evidence, in any provision in the act, of any necessity or supposed necessity for all or any part of the complicated machinery brought into existence by it to preserve the peace, to arrest offenders, execute criminal process, watch over the safety of the inhabitants, patrol the district, or perform the duties of a board of health in any part of the proposed district other than the city of Troy ; or that the performance of those duties or any of the ordinary police duties in either or all the tracts of land outside the city of Troy, included within the district, was in the minds of the legislators, in the enactment of the law. The entire scheme was intended for the city of Troy, and so far as it contemplates the creation and maintenance of a city police and a corps of patrolmen, it was adapted to the wants of a city ; but to the isolated house in North Greenbush, the small island of a dozen acres with its single manufactory and its one block of tenement-houses, and the land in Brunswick with its sixty-nine scattered dwellings, it was entirely uncalled for and unsuitable. They are left still, for all purposes, a part of their respective towns and town organizations. As before said, the act operated practically only to enlarge the boundaries of the city of Troy for the purposes of a police organization, and adjacent territory was brought within the jurisdiction of the city police."

For a notable instance of an attempt to evade a constitutional provision, see *Clark v. Barnes*, 26 N. Y. 301, *anté*, p. 303.

STEPHENS V. MONONGAHELA NATIONAL BANK.

(66 Penn. St. 157.)

National bank — accommodation maker of note — ultra vires — usurious interest — renewal note.

In respect to third persons, the accommodation maker of a note is liable to pay it according to its tenor, and cannot allege that he was merely a surety.

Forfeiture of the privileges and powers of a National bank must be determined, by a suit brought by the comptroller of the currency, and until determined, it may do business; and no person, by a conspiracy to evade its regulations, may escape liability for borrowed money loaned by it, upon personal security in the manner authorized.

In an action by a National bank against the maker of a note for accommodation, evidence was offered to prove a violation by the bank of section 5200 of the Revised Statutes of the United States, which declares "the total liabilities to any association of any persons or any company, corporation or firm, for money borrowed, including in the liabilities those of the several members thereof, shall at no time exceed one-tenth of the amount of the capital stock of such association actually paid in;" and that the loans in pursuance of it were in excess of the authority and power of the bank. The evidence being rejected, *held*, no error.

Where there has been a series of renewals for the same loan, in a suit by the bank upon the last note, the borrower is entitled to a credit for all the interest paid on the loan from the beginning and not merely the excess above the lawful rate.

ACTION on a promissory note made by and indorsed by Barzilla Stephens for the accommodation of Israel Stephens. The plaintiff had judgment on the following special verdict:

That the defendant gave a note to the plaintiff, dated October 10, 1874, calling for \$10,575, payable twenty-five days after date. That \$75 was charged as the interest on \$10,500, from its date to maturity of said note and put in the note. That for excessive interest over six per cent on all the transactions that Israel Stephens had with the plaintiff from April 7, 1870, there was charged to him the sum of \$1,907.04, and that the note in suit was a renewal of a note given by Israel Stephens in his life-time to said plaintiff, and that the balance due the plaintiff at this date, less all the interest from the date of the note in suit, and the amount of excessive interest as aforesaid, was the sum of \$8,592.96.

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The court rejected the following offers of evidence :

That the plaintiff has recovered judgment against Richard S. Long, one of the real debtors, issued execution, levied on a large amount of personal property, stayed the execution, and released the personal property of said Long. That defendant notified plaintiff to proceed and collect this judgment, as he would not stand bound as surety any longer.

That since said notice, the said R. S. Long has had a large amount of personal property which could have been sold on execution on said judgment. That the plaintiff has refused to collect the judgment of the real debtor, although said Long had sufficient real and personal property to satisfy said judgment. This, after sufficient notice from defendant to so proceed.

That the note in suit is one of several notes discounted by plaintiff for Israel Stephens and R. S. Long, who were partners in buying and selling cattle and other stock in the west. That the note in suit and the other notes just referred to were discounted under an agreement entered into by and between the plaintiff bank and Israel Stephens, that as the plaintiff bank could not loan the said firm of Israel Stephens and R. S. Long, without violating the law of Congress, only one-tenth of the capital stock of plaintiff bank being paid in, nor the individual members of said firm, said plaintiff bank would discount the notes for said Israel Stephens and Richard S. Long, to evade the provisions of the 29th section of the National Currency Act of 3d June, 1864 (being section 5200 of the Revised Statutes of the United States), and that the said loans and notes were in excess of the authority and power of said plaintiff to make.

The court refused to charge that if the jury believe that at the time the original of the note in suit and each renewal thereof was taken, the bank knowingly reserved and charged interest and discount thereon in excess of the amount permitted by the National Bank Act to National banks located and doing business in this State, then each of said notes was without consideration to the extent of the sums so reserved and charged as interest and discount.

That if the jury believe that the plaintiff knowingly violated any prohibition contained in the National Bank Act at the time it took the note in suit, and the prior notes of which it was the last renewal, then no action can be here maintained upon such contract made in violation of an United States statute.

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That the plaintiff being a National bank organized and doing business under an act of Congress, known as the National Bank Act, this court is without jurisdiction over this case.

A. A. Purman and P. A. Knox, for plaintiff in error. The loans were in excess of one-tenth, and plaintiff cannot recover. *Bank of the U. S. v. Owens*, 2 Pet. 538; *Dill v. Ellicott*, Taney's Cir. Ct. Dec. 233; *Maybin v. Coulon*, 4 Dall. 298; *Seidenbender v. Charles' Adm'r*, 4 S. & R. 151; *Holt v. Green*, 23 P. F. Smith, 198; s. c., 13 Am. Rep. 737; *Morris Run Coal Co. v. Barclay Coal Co.*, 18 P. F. Smith, 174; s. c., 8 Am. Rep. 159; *Bowman v. Cecil Bank*, 3 Grant, 36; *Mechanics' Savings and Loan Co. v. Conover*, 5 Phil. 18, and other cases referred to in *Fowler v. Scully*, 22 P. F. Smith, 466, 467; s. c., 13 Am. Rep. 699.

The amounts being received in violation of law cannot be retained, and neither time nor contract will sanctify them or legalize the defendant's possession as against the rightful owner. *Brown v. Bank*, 22 P. F. Smith, 212; *Lucas v. National Bank*, 28 id. 232; s. c., 21 Am. Rep. 17.

Sayers & Sayers, for defendant in error.

TRUNKEY, J. The maker of a negotiable note undertakes to pay it, according to its tenor, to any holder to whom it may be due. An accommodation maker is equally liable, except to the payee. In respect to third persons the law considers him just in the character he has assumed, and will not permit him to allege that the paper to which he gave his name was an imposition, nor to gainsay its reality by proof that it was a fiction. It shall be taken *pro veritate* that he was the drawer, for *de veritate* that was the very thing he was intended to be. *Bank of Montgomery County v. Walker*, 9 S. & R. 229. "We assume this broad principle that the man who draws a promissory note for the purpose of negotiation, must stand by it. He has placed himself in the situation of a principal, and shall not escape by alleging that he was a surety." *Walker v. Bank*, 12 S. & R. 382. The fact that the holder knew he had received no value will not relieve him, for by placing himself in front, the holder had a right to suppose that he was willing to abide the consequences. *Id.* The payee of an accommodation note may sell or discount it, or pledge it as collateral security for an antecedent debt,

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for he has a loan of the maker's credit without restriction. *Appleton v. Donaldson*, 3 Barr, 381.

By indorsement of a negotiable note, without qualification, the indorser promises that if the maker and previous indorsers do not pay it at maturity, when duly called upon and notified, he will, and this promise is to his immediate indorsee and every subsequent one. The indorsee of accommodation paper takes more than the rights of the payee, and can recover of the maker because the note was given for this very purpose. So is an accommodation indorser liable to subsequent indorsees. The principle is a general one that the person making or indorsing a negotiable note, for the benefit of another, is liable to a third person, even with notice of the want of consideration, but is not to the person for whose benefit the paper was signed. 2 Pars. on Bills and Notes, 27; Byles on Bills, 237.

An indorser is something more than a surety, and is liable in the first instance as a drawer. As between maker and indorsers the relation of principal and surety exists, and each prior party is a principal for each subsequent party. In an action by one who has paid the holder, extrinsic evidence may be admissible to show that the maker, in fact, is surety for the indorser. Every surety for another is discharged from the secondary obligation, if the creditor does not hold the principal debtor to his primary obligation with proper strictness. The rights and duties of indorsers and sureties are so alike that most acts which will discharge the one will also the other. But there are some distinctions important to observe lest a principle, exclusively applicable to one, be perverted. For instance, without due demand and notice, at the maturity of a note, an indorser will be discharged—a surety continues liable upon his contract, though the creditor sleeps. A surety may spur the creditor into activity by notice to pursue the principal debtor, on pain, for neglect, that the surety will be no longer bound—not so an indorser. The latter cannot call upon the holder of a protested note to sue the drawer, and if he refuses, thereby relieve himself, for if he wishes instant recourse to the principal, it is his duty to pay the note and sue for himself. *Beebe v. West Branch Bank*, 7 W. & S. 375.

It is well settled, sustained by authorities cited by counsel for plaintiff in error, that when the property of the principal has been taken in execution by the creditor, the lien thus acquired cannot be relinquished without discharging the surety, to an extent corresponding with its value. It is more than doubtful that in Pennsylvania

such result would follow a withdrawal of the execution before levy, though it was once so held in England. The distinction between the lien of the writ and lien of the levy seems to be that the latter is a technical satisfaction of the judgment. But it is now settled that if a judgment-creditor relinquish his levy upon personal property, leaving the same with the debtor, his debt is not paid, nor the lien upon the debtor's land postponed to a junior judgment. He may leave the goods in the debtor's hands, release his levy and abandon his writ, without affecting his right as an older lien-holder to claim the proceeds of sale of the debtor's land. Only when the goods, by the seizure, have been lost to the debtor is the judgment satisfied. *Campbell, Bredin & Co.'s Appeal*, 8 Casey 88.

Long kept his goods, and no part of the judgment against him was satisfied by relinquishing the levy and staying the writ. Were he the principal debtor, his surety might be released because of the creditor's duty to hold the levy for benefit of the surety. A barren levy is no payment in fact, and a levy of the goods of a surety, given up, is no bar to recovery against the principal. Stephens stands just as he placed himself upon the face of the note, and indulgence to the payee, who indorsed it, will not prejudice the holder. A composition accepted from the indorser would not relieve the maker further than the sum paid to the holder. *Love v. Brown*, 2 Wright, 307. It follows that the offers of testimony, B, C and E were rightly rejected.

It was earnestly pressed that the court erred in rejecting the offer to prove an agreement between the bank and Israel Stephens, to violate section 5200 of the Revised Statutes U. S., which declares that "the total liabilities to any association of any person, or of any company, corporation, or firm for money borrowed, including, in the liabilities of a company or firm, the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in;" and that the loans, in pursuance of said agreement, were in excess of the authority and power of the bank to make. No principle is better settled than that an action cannot be maintained on a contract, the consideration of which is either wicked in itself or prohibited by law. This has been often discussed, and recently in an able opinion by the present chief justice, in *Fowler v. Scully*, 22 P. F. Smith, 456; s. c., 13 Am. Rep. 699, a case relied on in support of the offered testimony. Not stopping to remark upon the rule, nor upon

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distinctions between cases within and without, we come to consideration of the statute, to ascertain if the alleged agreement prevents recovery of the money loaned.

The powers conferred on banks must be distinguished from regulations for their business. An act done without authority, and forbidden, is not like one which violates a regulation. In *Fowler v. Scully* the action was upon a mortgage, showing on its face that it was taken to secure loans to be made, and "to avoid the necessity of procuring the additional indorsement to said paper of a third party." It was held that, 1. Under section 5736 banks have power to loan money on personal security, but not upon other; 2. Section 5137 authorizes them to take mortgages to secure debts previously contracted, 3. They are prohibited, by necessary implication, from lending money on the security of a mortgage. The reasoning in support of these conclusions seems unanswerable, yet so close was that case to the border beyond which a contract will not be held void for illegal consideration, that two-fifths of the judges believed it on the other side and dissented from the judgment. Here the note was in the power of the bank to take, and the security was personal. Nothing on the face of the note, nor in the plaintiff's evidence, shows a taint of illegality. It appears as clear as any transaction within the conceded powers of the bank. The statute has many provisions for regulation of banking business. Some sections, as 5197 and 5198, relating to interest, contain clauses of forfeiture and penalty for violation. But everywhere it has been held that the bank may recover the money actually loaned upon a usurious contract. Other sections, as 5201 and 5208, for violation, subject the bank to appointment of a receiver. Nearly all the sections, including 5200, relating to liabilities of any one person to the bank, are vindicated by the provisions in section 5239, which declares that a willful violation of any provision shall forfeit the rights, privileges and franchises of the association. Such violation can only be determined by suit brought by the comptroller of the currency in the proper court of the United States. And in case of such violation, every director who participated in or assented thereto shall be personally liable for all damages, in consequence of the violation, sustained by the bank, its shareholders or any other person. Until the forfeiture be determined, in the mode provided, the bank may do business; and no person, by a conspiracy to evade its regulations, may escape liability for borrowed money, loaned by the bank, upon

personal security in the manner authorized. In *O'Hare v. Second National Bank of Titusville*, 27 P. F. Smith, 96, it was said, per AGNEW, C. J. : "Evidently the limitation of the indebtedness to the one-tenth in the 29th section (5200, R. S.), was intended as a general rule for conducting the business of the bank; a rule laid down from experience to regulate its loans for its own best interest, and those of stockholders and creditors, not a rule to regulate its customers. It was, as remarked in *Fowler v. Scully*, a regulation to prevent these associations from splitting on the rock which has ruined so many banks, to wit, that of lending too much of their capital to one person or firm. The intention being to protect the association and its stockholders and creditors from unwise banking, we cannot suppose it was meant to injure them by forbidden recovery of the injudicious loans. We should not interpret the section so as to carry its prohibition beyond its true purpose, and thus cause it to destroy the very interest it intended to protect by regulation. To do so would be, as said by the court below, to demand a penalty in favor of one individual for an offense against the country, and invite to dishonesty under a pretense of a regard for the law." If this language was not strictly necessary to disposition of that case it is apposite here, and demonstrates that a contract purposely made in evasion of that section is not void. Of course, we have considered the offer as true, namely, that there was a conspiracy between the bank and the borrower to violate the statutory regulation. The question is whether the note is invalid on general principles of policy, and not one of equity and justice between the parties. The public good is the ground of relief to a defendant who proclaims his own turpitude in the willful violation of a statute, and his shame in refusing payment of what he justly owes — not his worthiness. The bank is treated as a conspirator, but the fact is unmistakable that it was its officer. It is not the intentment of the statute to provide a way by which an unfaithful officer and dishonest stranger may empty the vaults of the bank, work its ruin, to the great loss of its shareholders and creditors, and the receiver of its money, wrapped in the mantle of public policy, escape liability.

Error is assigned to the rulings of the court limiting set-off of excess of interest, paid on other transactions, to a period within six years preceding the trial. While it may be true, that neither time nor contract will sanctify or legalize the taking and holding of usurious interest by a National bank, it is just as certain that the

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remedy for the owner to recover it back is by a personal action. The right of action accrues the very instant the usury is paid. That it is barred in six years by the act of 27th March, 1713, is too plain for remark. It is difficult to imagine a case where the statute does not begin to run from payment of the usurious money, for the owner almost necessarily has knowledge of the facts from the first. In case of fraud the statute runs from its discovery. Not a tittle was shown to toll the statute, at law or in equity.

The rulings of the learned judge upon the question of jurisdiction need no vindication. They accord with the doctrine in *Bletz v. Columbia National Bank*, 6 Norris, 87; s. c., 30 Am. Rep. 343.

But one other point requires special notice. Since this cause was tried in the court below, it has been decided that where there has been a series of renewal notes given to a National bank, for the continuation of the same original loan, and the bank sues to recover its debt on the last, the borrower is entitled to credit for all the interest he has paid from the beginning, on the loan, and not merely to the excess above the lawful rate. All interest paid, or charged and put into the notes, must be credited. *Overholt v. National Bank of Mt. Pleasant*, 1 Norris, 490; *Cake v. Bank*, 5 id. 303; Nothing can be added to the opinion of SHARSWOOD, J., in *Overholt v. Bank*. The rulings upon offers of testimony, answers to points and charge, so far as inconsistent with the principles of that case, are erroneous. And for this judgment is reversed, and a *venire facias de novo* awarded.

Judgment reversed.

LYNCH V. COMMONWEALTH.

(38 Penn. St. 189.)

Criminal law — voluntary absence of prisoner at rendition of verdict.

A bailed prisoner on trial for larceny voluntarily left the court room during the deliberation of the jury, and on the coming in of the jury, being called and not appearing, a verdict of guilty was received and sentence was pronounced in his absence. *Held*, no error.

CONVICTION of larceny. The prisoner, who was on bail, left the court room while the jury were out. When they came in, he was called, but did not appear, and a verdict of guilty was received and recorded, and sentence was pronounced in his absence.

S. F. Bowser and *J. H. Bowman*, for plaintiff in error. The verdict, whatever may be its effect, must, in all cases of felony and treason, be delivered in the presence of the defendant in open court, and cannot be either privately given or promulgated while he is absent. Co. Litt. 237; 2 Just. 117; Sir Thomas Raymond, 198; 2 Hale, 300; 2 Hawk. 47, § 2; 4 Bl. Com. 340; Bac. Abr., tit. *Verdict*; Burns' Justice, tit. *Juror*; 1 Bish. on Crim. Law, 580; Chit on Crim. Law, 600; *Clark v. State*, 4 Humph. 254; *Sneed v. State*, 5 Ark. 431; *Prins v. Commonwealth*, 6 Harris, 103.

W. A. Forquer, district attorney, and *Clarence Walker*, for the Commonwealth.

AGNEW, C. J. The question in this case is, whether upon the trial of a defendant for *larceny*, it is error to take the verdict of the jury, when he is not present, though he is out on bail, is voluntarily absent, and is called when the jury are ready to deliver their verdict.

In the note at page 602 of the 7th volume of Bioren's edition of the Laws, it is said that the act of 31st May, 1718, is the basis of our criminal law. In the note to the act itself the same remark is quoted from Mr. Bradford's essay on the criminal law of this State (vol. 1, p. 105). Justice COULTER adopts this statement in *Dunn v. Commonwealth*, 6 Barr, 385. Though much of this act has been altered and supplied, some yet remains, and Justice COULTER says in that case that as to the judgment and sentence in criminal cases the act is still in force. These references are made because of the important bearing the act of 1718 has upon the question before us.

It is well known that William Penn was opposed to the infliction of capital punishment except in the single instance of willful murder, and beginning with temporary laws, he endeavored to reduce the punishment of all other offenses, capital by the laws of England, to lower grades. His efforts were fruitless, however, for when these laws were enacted permanently, they were repealed by the queen in council. This led, as the preamble to the act clearly indicates, to its passage. It not only enacted capital punishment for a number of offenses, but declared in the sixth section that "when any persons shall be so as aforesaid convicted or attainted of any of the aforesaid crimes, they shall suffer as the laws of Great Britain now do,

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or hereafter shall, direct and require in such cases respectively." Thus in the same year the proprietor died the laws of his province became a code of blood for the following offenses : treason, murder, robbery, burglary, rape, sodomy, buggery, arson, malicious maiming, manslaughter by stabbing, concealing by the mother the death of her bastard child, witchcraft and conjuration, and every felony (except *larceny*) on a second conviction.

The third section declared, "that the inquiries and trials of all petit treasons, misprisions of treason, murder, manslaughter and homicides, and all such other crimes and misprisions as by this act or any other act of assembly of this province are or shall be made *capital or felonies of death*, which have been or shall be done, committed, perpetrated, or happen within this province, shall be as by this act is directed." The sixth section then directs judgment and sentence to be pronounced by the justices of the court according to the manner, form and directions of the laws of England, and execution to be awarded accordingly. A supplement to this act, passed February 26, 1767 (2 Sm. Laws, 274), enacted that the arson of any dwelling-house, house, barn or outhouse having hay or corn therein, and the counterfeiting of gold and silver coin coined in this province, should be felonies of death without benefit of clergy.

These laws became the foundation of the exclusive jurisdiction of the Court of Oyer and Terminer in capital cases, which has since continued. But simple larceny never was a crime triable in the Oyer and Terminer exclusively, and in the act of 1718, it stood on so low a footing that the first offense was punishable only with restitution of the value of the goods, payment of the costs and expenses of the owner, a fine of double the value of the goods, and a whipping not exceeding twenty-one lashes; the commitment to jail being only till satisfaction of these should be made. The punishment for a second offense was the same, excepting that the number of lashes should be not less than twenty-one, and not more than forty. As a consequence, simple larceny, whether grand or petit, has always been triable in the Court of Quarter Sessions in the same manner as misdemeanors. So the mayor, recorder and aldermen of Philadelphia (viz.: the Mayor's Court), had the same jurisdiction to try and punish "all *larcenies*, forgeries, perjuries, assaults and batteries, riots, routs and unlawful assemblies, and all other offenses which have been committed or shall be committed, within the said city, which would be cognizable in any Court of

General Quarter Sessions of the Peace of, or for any county within this Commonwealth," etc.

The fact that larceny is called a felony is of no importance. Felony, as a term, is incapable of any definition, and is descriptive of no offense. Indeed its origin seems to have been a puzzle to law writers. According to Sir WILLIAM BLACKSTONE, it now imports an offense which occasions a total forfeiture of either lands or goods, or both, at common law, and to which capital or other punishment may be superadded, according to the degree of guilt. 4 Com. 95. And even this forfeiture was abolished by the Constitution of this State, of 1790, except during the life of the offender. Art. 9, § 19. It is therefore well said in the note, at page 692, in the seventh volume of Bioren's edition of the Laws, that the term "felony" has become useless and unintelligible, for it seems to mean something, when in truth it conveys no distinct ideas. It comprehends, says the annotator, two descriptions of punishment, the one capital, with the forfeiture of lands and chattels; the other, not capital, with forfeiture of chattels only, and the form of burning in the hand, to which imprisonment, etc., may be added. These notes have the weight of authorities by the recommendation of Chief Justice TILGHMAN, and Justices DUNCAN and GIBSON, who say, in their certificate of examination of the sixth and seventh volumes of these laws, that the notes on the criminal laws are the fruits of much labor and research, and cannot fail to be of general utility. Vol. 7, p. 18.

Thus it appears that larceny, while termed a felony, is not, in the light of legal history, one of those offenses which in this State were tried in the solemn forms of the courts of England, required by the act of 1718 to be adopted in cases then declared to be capital. This will enable us to understand better the force of the expressions of Chief Justice GIBSON and others in the cases cited in the argument. Thus in *Prins v. Commonwealth*, 6 Harr. 103, upon an indictment for *burglary*, Chief Justice GIBSON said: "Never has there, heretofore, been a prisoner tried for felony in his absence. No precedent can be found in which his presence is not the postulate of every part of the record. He is *arraigned* at the bar, he pleads in person at the bar, and if he is convicted he is asked at the bar what he has to say why judgment should not be pronounced against him." In these observations he evidently refers to the trial of cases once capital. It is to such also Justice COULTER

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refers, as evidenced by his language — “ trials that affect life ” — “ Crimes affecting life or limb (when) the prisoner must be present, when the evidence is given in during the trial, and when the verdict is returned.” We are not left to mere inference as to the meaning of Chief Justice GIBSON, for we have his opinion long before, in the well-considered case of *Jacobs v. Commonwealth*, 5 S. & R. 315, in which he held that upon an indictment for *larceny* it is not necessary that *arraignment* should appear of record. All that appeared was the plea of not guilty indorsed upon the indictment. He said there, “ The entry of the arraignment is the record of the defendant’s appearance in court for the purpose of being tried, and is necessary only when he must appear in person. In all misdemeanors a defendant may appear and plead by attorney; but as no one can be convicted of a *capital* offense in his absence, it necessarily results that in trials for offenses of that grade, it should appear by the record that the defendant was personally present.” He then refers to the act of 1718 as the groundwork of our present Code, and the practice under it in *capital* cases, remarking that the course of trial in such cases is still the same in these cases, adding that with us *larceny* never was capital. The sentence in that case was therefore affirmed.

Thus *larceny* by this decision is taken directly out of the list of offenses in which arraignment must affirmatively appear upon the record. When we consider also comparatively the greater degree of moral turpitude in those high misdemeanors, such as perjury, forgery, bigamy, etc., wherein the defendant may appear and plead by attorney, it cannot be doubted, even if arraignment be necessary as a fact in a trial for larceny, that mere voluntary absence at the rendition of the verdict, by one out on bail, who has appeared, and been tried regularly, is not a fatal error. He loses no valuable right thereby, for he may move for a new trial, or in arrest of judgment, and cannot be sentenced until he appears. He cannot move in arrest of judgment because the arraignment does not appear of record, for the entry is not essential to the regularity of the record, as held in *Jacobs v. Commonwealth*. If essential, he can take advantage of the want of arraignment only by a motion for a new trial. Presence at the verdict is clearly less important. In whatever way we view the case, voluntary absence when the verdict is received is an error of which he cannot complain.

We must not overlook in this connection the constant amelioration.

tion of the Penal Code which began in 1786. The last act of severity was that of 8th March, 1780 (1 Sm. Laws 498), which took away the benefit of clergy from robbery from the person whether on or off the highway. Then came the act of 15th September, 1786, which began amelioration by the substitution, for the penalty of death, of imprisonment at hard labor, with forfeiture of estate, real and personal. Since that time a gradual mitigation has taken place in the trial and punishment of offenders, until now the Criminal Code, consisting of the two acts of March 31st, 1860, has placed the trial of offenses on a more reasonable basis than when they were punished with great severity.

Therefore when we consider that larceny has always been a bailable offense, even before a justice of the peace (except in the case of horse-stealing), that its trial is put on the same footing with misdemeanors in the Quarter Sessions und Mayors' Courts, that in misdemeanors the defendant may appear and plead by attorney, there is no reason for holding that mere voluntary absence at the rendering of the verdict, by one out on bail, who is called and does not appear, is a ground for reversing a sentence regularly passed. One so absent waives his privilege. What can be done but to call him? Is the jury to be held until he appears, and if so, how long? Not being in custody he cannot be had. If the jury be discharged what is the legal consequence? Is it a mistrial, or can he plead the discharge in bar? Is his forfeiture of bail a legal substitute for conviction? And if the discharge be no bar, the offense being a bailable one, how will a similar result be prevented at the second or any subsequent trial? Surely the interests of justice cannot be so trifled with. We are of opinion there is no error in this record, and the sentence must be affirmed.

Sentence affirmed, and it is ordered that the record be remitted to the Court of Quarter Sessions of Butler county, with instruction to bring in the defendant, and to carry the sentence of that court into effect.

SHARSWOOD, J., dissented.

Erie & Pittsburgh Railroad Company v. Douthet.

ERIE & PITTSBURGH RAILROAD COMPANY V. DOUTHET.

(88 Penn. St. 243.)

Contract — to give free pass over railway — measure of damages for breach.

In consideration of the grant of a right of way over his land, the defendant agreed by parol to furnish the plaintiff for life with a free pass for himself and his family over its road. The pass was given for a while and then refused. In an action for breach of the contract, *held*, that the measure of damages was the value of such pass, to be approximated as closely as the nature of the case would admit.

CASE for damages for the breach of an agreement to furnish plaintiff for life with a pass for himself and family over defendant's railroad. Plaintiff by deed, reciting a consideration of \$1, gave to the defendant a right of way over his land. The company agreed, through its president, by parol, as a further consideration, to furnish plaintiff with a free pass for himself and family during his life. This agreement was carried out until 1874, when, upon the refusal of the company to furnish him with the pass as usual, plaintiff brought this action.

The court charged: "That the measure of damages in this case is the value of a pass for the plaintiff and his family over the line of the defendant's road from the time of the refusal by the defendant during the probable remainder of the plaintiff's life." The defendant asked for an instruction that:

The measure of damages, if any, would be the actual amount expended by plaintiff for fares, and he would not be entitled to claim damages because of non-travel. To which the court replied:

"The first part of that we answer in the negative. The latter part we would affirm as an abstract proposition that he would not be entitled to claim damages because of non-travel, but he is entitled to the pecuniary value of the annual pass. The pass may have been used for business or pleasure. You will take into consideration the number and character of his family; whether necessity or desire for pleasure would lead him or his family to go often or less frequently, or for what distance they would, for business or pleasure, be apt to travel." The court also charged:

"You are to take into consideration the surrounding circumstances of Mr. Douthet and his family; whether it would be possi-

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ble that they would have occasion, for business or pleasure, to use the pass to Jamestown, New Castle and Greenville." Also, "In determining the pecuniary value of this annual pass, it is your duty to take into consideration the station in life of Mr. Douthet, and his age, because this was an annual pass during his life."

Verdict for plaintiff for \$500.

J. Ross Thompson, for plaintiff in error. The contract was for the transportation of plaintiff and family, and on failure of defendants the measure of damages, as in all other cases, would be simply what it would cost the party claiming the breach of contract to be put in the same position as if the contract had been carried out. The doctrine of the measure of damages as to failure of common carriers to transport merchandise is well settled in *O'Connor v. Forster*, 10 Watts, 418; *McGovern v. Lewis*, 6 P. F. Smith, 231; *Fessler v. Love*, 12 Wright, 407; *Adams Express Co. v. Egbert*, 12 Casey, 360; *Pennsylvania Railroad v. Titusville & Pitt Hole Plank Road Co.*, 21 P. F. Smith, 350.

J. B. Brawley, for defendant in error.

PER CURIAM. This is rather an uncommon case. The agreement of the defendants was to give the plaintiff a pass over their railroad for himself and his family for his life-time, as the consideration of his release of the right of way over his land. The pass was given for a while, and then refused, and this action was to recover damages for their breach of contract.

The contract was not simply for a right to ride free upon the railroad. Possibly if in those terms the plaintiff might recover damages for each refusal, or combine his claims for damages for each refusal in a single action to cover any period, as a quarter or a year. But the contract being for a pass, or in other words a free ticket, this document was the principal feature in the bargain. It is obvious that a mere contract to ride free of charge would subject both parties to inconveniences. The company of necessity must operate its road by agents, viz.: conductors of trains, and would be liable to suits through the mistakes or ignorance of their servants. So, too, the plaintiff without the evidence of his right would be liable to be refused often when his business might be most urgent. But a pass or free ticket would relieve both parties from difficulty. The pass being the principal feature of the contract was therefore main

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its chief subject, for it was the document to be furnished as the evidence of the plaintiff's right. Hence we see no other rule to be applied to the case but damages for the refusal of the pass, as the only cause of action, and this being single, to be compensated by such damages, as a pass for life for himself and family would be worth. It is true it is difficult to estimate its value because of two uncertainties—one the length of life, and the other the number of passages he and his family would probably demand. Still this uncertainty, like many others, must be made to approximate certainty as closely as the nature of the case will admit of. The burden of proof lay on the plaintiff, who knew the number of his family, and the customary number of trips made by himself and them.

Upon the whole, we see no manifest error in the record.

Judgment affirmed.

LOGAN V. CASSELL.

(88 Penn. St. 233.)

Negotiable instruments—holder as collateral—right to maintain action on, after payment of his debt.

One to whom a note has been indorsed as collateral security may maintain an action thereon against the maker, after the payment of his debt, either for himself or as trustee for the payee, unless the maker is thus deprived of some equitable defense as against the payee.*

ACTION on promissory notes. The opinion states the case. The defendant had judgment.

J. W. Goheen, for plaintiff in error.

John Dolman, for defendant in error. The verdict of the jury has established the following facts. The payee indorsed the notes to plaintiff as collateral security for a debt. The indorser afterward paid plaintiff the debt in full. The debt for which they were pledged having been paid, and the notes coming due, the payee demanded the notes and tendered to plaintiff whatever might be due him. That plaintiff having been paid in full, and refusing to

* See *Nat. Pemberton Bk. v. Porter* (125 Mass. 335), 23 Am. Rep. 235.

return the notes to Conner, to whom they belonged, the maker, Cassell, considering Conner as the equitable holder and owner of the notes, paid him in full the amount of said notes, and took his receipt in full therefor ; so that everybody connected with the notes is paid in full.

MERCUR, J. This action was by the indorsee against the maker of two promissory notes. They were duly executed and delivered by the defendant to the payee for a valuable consideration. No subsequent failure of consideration is alleged. They were indorsed and delivered by the payee to the plaintiff, in consideration of money received from the latter at the time of the transfer and delivery. It is conceded that they were unpaid at that time, and that the defendant then had no defense against them.

One contention on the trial was whether the plaintiff purchased the notes of the payee, or whether they were transferred to him as collateral security only, for the payment of money he then advanced. In either case the plaintiff acquired the possession of them in good faith, and for a valuable consideration paid at the time.

Evidence was given tending to show that after the notes matured in the hands of the plaintiff, the defendant, with knowledge that the plaintiff held, and claimed to own them, settled with the payee and took his receipt in payment thereof. In the hurry of trial, the learned judge appears to have overlooked the effect of this alleged payment by the maker, and failed to submit the question to the jury. It is true the court charged that if the plaintiff purchased the notes he could recover their full amount ; but if he held them as collateral he could recover only the amount due him on the original debt. So far as this goes it was correct under the authority of *Appleton v. Donaldson*, 3 Barr, 381. But those two questions both found against the plaintiff were insufficient to defeat a recovery against the defendant. The plaintiff having obtained the notes in good faith he might maintain an action on them in his own name, although the right of property therein had again passed to the payee. Whether the plaintiff sued for himself, or as trustee for the payee, constituted no defense for the maker, unless he was thereby deprived of some equitable defense which he may have had as against the payee. 2 Pars. on Notes and Bills, 437; *Whiteford v. Burckmyer*, 1 Gill. 127 ; *Mauran v. Lamb*, 7 Cow. 174 ; *Doss v. Hewit*, 5 Wend. 257 ; *Brown v. Clark*, 2 Harr. 469 ; *Pearce v.*

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Austin, 4 Whart. 489; *Holmes v. Paul*, 6 Am. Law Reg. 482; *Balentine v. McGeagh*, 4 Brewst. 95; *Way v. Richardson*, 3 Gray, 412. Hence, although the notes were taken by the plaintiff as collateral and he had been fully paid the debt for which they were pledged, so that he had no right of property therein as against the payee; yet still the plaintiff was entitled to recover unless the defendant had fully paid them to the payee. It therefore follows the learned judge erred in instructing the jury, that if the notes were held as collateral, the plaintiff could recover only the amount he showed to be due on the original debt, without adding that they must also find the defendant had paid the excess, due from him on the notes, to the payee. Judgment reversed, and a *venire facias de novo* awarded.

Judgment reversed.

FAIR V. CITY OF PHILADELPHIA.

(88 Penn. St. 309.)

Municipal corporation—negligence—insufficient capacity of sewers.

A municipal corporation is not liable for damage caused by the accumulation of surface water on city lots, when owing solely to the insufficient size of sewers, which are not defective in construction nor out of repair.*

ACTION of damages by reason of insufficiency of a public sewer. The opinion states the case. The defendant had judgment below.

David W. Sellers and *Henry McIntyre*, for plaintiff in error. While it may be optional with the city to construct sewers, when they have constructed them and citizens rely upon them, it is the duty of the city to keep them unobstructed. *Child v. City of Boston*, 4 Allen, 41. When a citizen has adequate drainage for his premises, its destruction by the municipality is a good cause of action. *Commissioners v. Wood*, 10 Barr, 93; *Munn v. Pittsburgh*, 4 Wright, 364; *Borough of Allentown v. Kramer*, 23 P. F. Smith, 406.

C. B. Morgan, assistant city solicitor, and *Wm. Nelson West*, city solicitor, for the city.

*See notes, 20 Am. Rep., 622; 24 id. 556.

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MERCUR, J. This was an action on the case. The plaintiff claimed to recover damages which he had sustained by reason of the insufficiency of the public sewer to carry off the surface water which accumulated on his premises. The case was submitted to a referee. He found the facts and stated his conclusions of law. No exceptions were filed as to the correctness of his finding of facts. The exceptions to his conclusions of law, finding the city was not liable for damages, were overruled and judgment entered for the defendant. This presents the alleged error.

It appears that the house of the plaintiff was situate at the corner of Thirteenth and Fitzwater streets. Formerly, the sewer in that vicinity was of sufficient capacity to pass, and did pass, rapidly not only the water with which it was otherwise charged, but also the surface water which either fell or flowed on the land of the plaintiff. Afterward and before the injury complained of the city extended its system of sewerage westerly, thereby causing a larger volume of water to flow through the sewer past the premises of the plaintiff. During violent storms the sewer was so charged with water as to prevent the surface water, which accumulated on the lot of the plaintiff, from flowing into and through the sewer, thereby causing the injury of which he complains.

The unquestioned finding of facts establishes not only that the whole injury was caused by surface water which accumulated on the premises of the plaintiff, but that none of it was thrown there by reason of the construction of the new sewer. None of the water which passed into that sewer was forced back or out of the old sewer so as to flood either the streets or the plaintiff's property. The surface water causing the injury was none other than that which had been accustomed to flow there. The sewers were not defectively constructed. They were not out of repair. No negligent conduct can therefore be imputed to the defendant. It follows then that the right of the plaintiff to recover must rest on the omission of the city to make sewerage of sufficient capacity to receive and pass all the surface water which accumulated along the line of the sewer. Conceding the insufficient capacity, it was only an error of judgment in the city authorities as to the size of which the sewer should have been constructed.

The time and manner of draining the streets of the city require the exercise of judgment, deliberation and discretion of the municipal authorities. The duty is therefore one of a judicial character.

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It involves a consideration of the financial condition of the city, and of the time and plan of construction. It must therefore be left to the municipal authorities to determine the extent and capacity of the sewerage to be constructed, and not to the verdict of a jury to decide at the suit of an owner of property aggrieved. So long as it is the mere omission, as here, of the authorities, to provide adequate means to carry off the water which storms, and the natural formation of the ground, throw on a lot, the owner thereof cannot sustain an action against the municipality. This conclusion flows from the sound rule that a municipality is not liable for damages resulting from a lawful exercise of its discretionary power to plan and construct sewers and other improvements. *Mills v. City of Brooklyn*, 32 N. Y. 489; *Smith v. Mayor of New York*, 66 id. 295; s. c., 23 Am. Rep. 53; *Carr v. Northern Liberties*, 11 Cas. 324; *Grant v. Erie*, 19 P. F. Smith, 420; s. c., 8 Am. Rep. 272. The facts of the case before us do not bring it within *Child v. City of Boston*, 4 Allen, 41; *Mayor v. Furze*, 3 Hill, 612; *Allentown v. Kramer*, 23 P. F. Smith, 406. They rest on some neglect of the authorities to repair or keep the improvements in proper condition. While, therefore, we cannot rest the present judgment on the unusual or unprecedented character of the showers, yet for the other reasons stated the judgment is affirmed.

Judgment affirmed.

DALY V. MAITLAND.

(33 Penn. St. 384.)

Damages — penalty or liquidated — attorney's fee in mortgage.

A stipulation, in a mortgage, for an attorney's fee for collection, is a penalty rather than liquidated damages, and may be reduced in the discretion of the court.*

SCIRE FACIAS upon mortgage. The mortgage contained the following clause, "and provided also, that it shall and may be lawful to and for the said Henry Maitland, his heirs, executors, administrators and assigns, when and as soon as the principal sum hereby secured shall become due, * * * to sue out forth-

*See *Myer v. Hart* (40 Mich. 517), 29 Am. Rep. 553.

with a *scire facias* upon this indenture of mortgage, and to proceed therein to judgment and execution for the recovery of the whole of the said principal debt, and all interest and taxes due thereon, together with an attorney's commission for collection, viz.: five per cent besides costs of suit without any stay, any law or usage to the contrary notwithstanding."

The following points for the defendants were refused :

1. That the plaintiff is entitled to recover upon the mortgage above the amount of the mortgage and interest, a reasonable attorney fee for the collection of the mortgage, and what is a reasonable fee must be proved by plaintiff to recover it.

2. That the plaintiff is entitled to recover under the mortgage sued on only a reasonable attorney fee, in addition to the amount of the mortgage and interest.

The court charged that " The plaintiff is entitled to recover the full amount of his debt covenanted in the mortgage to be paid, including the five per cent, upon the amount of the mortgage debt for collection — that being expressly stipulated for in the mortgage to be paid on a contingency which is admitted to have happened." Judgment accordingly.

C. H. Gross and T. J. Barger, for plaintiffs in error.

J. Rodman Paul and A. Sidney Biddle, for defendant in error. That these commissions are not a penalty, but in the name of liquidated damages, is *res adjudicata*. *Robinson v. Loomis*, 1 P. F. Smith, 78.

SHARSWOOD C. J. In *Huling v. Drexel*, 7 Watts, 126, it was decided by this court that a stipulation in a mortgage, that in the event of the necessity of proceeding to recover the mortgage by suit, the mortgagee shall be entitled, in addition to the debt and interest, to damages for cost and expenses incident thereto, was not usurious, and might be enforced in the *scire facias*. In consequence of this decision, it has become common to insert a provision not only in mortgages, but notes and other instruments for the payment of money, that the creditor, in the event of being obliged to resort to a suit, shall recover a certain percentage as commissions to the attorney who is retained by him to collect the debt. This commission, it has been held, does not belong to the attorney, but to the cred-

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itor. It cannot be collected as costs, but must be included in the judgment. *Mahoning County Bank's Appeal*, 8 Casey, 158; *McAllister's Appeal*, 9 P. F. Smith, 204; *Faulkner v. Wilson*, 3 W. N. C. 339; *Schmidt & Friday's Appeal*, 1 Norris, 524. In *Robinson v. Loomis*, 1 P. F. Smith, 78, it was ruled that such commission was not a penalty, but an agreed compensation to the mortgagee for expenses incurred by the default of the mortgagor.

It is undoubtedly true that the parties to a contract may lawfully agree that the damages in case of a breach shall be liquidated at a certain amount. Equity will not relieve against such a contract, fairly entered into, unless it is evidently a penalty. This principle of liquidated damages is not applicable, however, to a contract for the loan of money—at least such stipulation is subject to the control of courts of equity. As in the days of Solomon, “the borrower is servant to the lender,” and courts of equity, from the earliest period, have assumed the jurisdiction of relieving the borrower from unreasonable and oppressive stipulations, exacted from his necessities, altogether apart from the statutes against usury. Especially has this always been the case as to mortgages. Agreements embarrassing or restraining the equity of redemption have invariably been set aside. The stipulated commission for the attorney may be so far beyond the ordinary rate charged for such services as to require imperatively the interposition of the equitable powers of the court. Equity has always been a part of the law of Pennsylvania. In the administration of equitable principles, it is the court and not the jury who exercise the functions of the chancellor, even where the action is in the common-law form. The jury, like the same tribunal in an issue directed by the chancellor, decide disputed facts, but it is the court that must be satisfied and apply the equity on the facts found or undisputed. If they think an equitable title to relief not made out by the proofs, it is their duty so to direct the jury, and *contra*, if they think the equity has been established. These rules are so familiar and well settled that it would be a work of supererogation to cite the numerous cases which support them.

We think these principles apply to the questions raised upon this record. The lender of money on any species of security cannot exact an unreasonable stipulation in the shape of an agreed liquidation of damages. Equity interposes her shield to protect the borrower. The debtor in cases of this kind will readily yield to the demand of the creditor, as he would be apt to regard collection

by suit as a remote and improbable contingency. Even at law what is reasonable is often indeed a question of fact, but in many cases it is a pure question of law. Thus, notice of the non-payment of a promissory note, though it was at first submitted to the jury to decide whether it was within a reasonable time, is now unquestionably the exclusive province of the court; so it is now held that after a lapse of seven years an abandonment of a title by settlement is a conclusive presumption of law. No court has ever thought of sending an issue to a jury to determine what is reasonable compensation to trustees. They would be a tribunal entirely unsafe to intrust with such a question. These decisions have been reached by the necessity of certainty in the rules in such cases. Many other illustrations could be given. It is important, unless we are prepared to say that the lender may stipulate for any amount as commissions for the collection of his debt, that there should be some more certain rule than could be reached by submitting every case to a jury. It would practically in a great number of cases have the effect of destroying the stipulation altogether. If the question must in every case be referred to a jury, the creditor will abandon the claim sooner than encounter the delay, and the risk of a very small sum being allowed. The court, from practical knowledge of professional work, are able to say in every particular case what ought to be the compensation or rate of commissions for collecting a debt by suit. Whatever is stipulated beyond a reasonable rate should be relieved against upon equitable principles. Certainly no certain commission can be determined upon to be applied to all cases. As responsibility as well as labor and skill is involved, in reason and the usage of the profession, it depends upon the amount collected, but not absolutely so. If there should be no defense to the mortgage, or other instrument of writing for the payment of money, the court, in giving judgment, can decide whether the stipulated rate is too large, and enter judgment for what is right. Should, however, a defense be set up in whole or in part, and the case necessarily go to a jury, it would be the province of the court to instruct the jury what, under all the circumstances, should be allowed, of course not exceeding the agreed rate.

It does not appear by the paper-books that there was in this case any rule for judgment for want of an affidavit of defense, though it does appear that there was no other defense than the amount of the collection fee. Had there been such a rule, the court should

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have decided the question, and not have sent the case to the jury. We think the learned judge below was right in refusing to leave it to the jury to determine the rate of commission, but he was wrong in instructing them to find the full amount agreed upon. Five per cent upon \$14,000, in other words \$700, was far beyond what was reasonable, even in view of the fact that the defendant below had interposed a defense against the commission, and that the case might be carried by writ of error to this court. We think, even under these circumstances, two per cent would have been an ample and liberal allowance, and the jury should have been so instructed. In general this court will not review the exercise of a sound discretion by an inferior court upon such a question, and the presumption will always be in favor of their decision unless it is plainly excessive, or as appears to have been the case here, founded on the mistaken idea that they had no equitable power to interpose and moderate the agreed amount.

Judgment reversed, and venire facias de novo awarded.

MERCUR, J., dissented.

WOODWARD, J., filed the following concurring opinion:

So long as contracts, stipulating for the payment by debtors of the expenses of litigation incurred by their creditors, shall be held to be within the policy of the law, the rule that has prevailed hitherto ought to be maintained. That rule has been to treat the amount of collecting fees agreed upon as stipulated damages, and not as a penalty. The agreements of parties should be carried out except where in affidavits of defense or in trials of causes, circumstances of oppression or injustice should be affirmatively disclosed, or an attempt to evade the usury laws should be indicated. In every such instance, the question as to the amount of the allowance should be settled by a jury. Scarcely any case could arise in which some element of fact outside the instrument in suit would not enter. And an inquiry into doubtful and complicated facts would be frequently indispensable. The judges of the courts ought not to be required to assume a duty of this sort.

Acquiescing in the action of the majority of the court in reversing the judgment, I would refer the question in controversy to the determination of a jury.

Hass v. Philadelphia and Southern Mail Steamship Co.

• HASS V. PHILADELPHIA AND SOUTHERN MAIL STEAMSHIP CO.

(88 Penn. St. 260.)

Master and servant — stevedore — independent employment.

A steamship company employed a stevedore to load and unload its vessels at New Orleans. The stevedore employed his own men, machinery, and planks, and had charge of the work to the exclusion of the master and crew. A watchman employed on one of the steamships, while it was being loaded, stepped on a plank used and placed by the stevedore or his men, and received injury from its tilting. *Held*, that the questions whether the stevedore was a servant or contractor and whether the plaintiff was a fellow-servant were for the jury.*

ACTION for damages for personal injury by negligence. The plaintiff was a night watchman on defendant's steamship *Tonawanda*. The vessel was lying at the levee at New Orleans, her deck being some five feet lower than the levee. Gangways of plank, some thirty feet long, extended from the levee to the vessel's hatches, resting on supports on the deck, and steadied by blocks, increased or decreased in number and arranged to conform to the rise and fall of the vessel with the tide, and keep her level with the levee. When the vessel fell, there would be a space between the blocks and the ends of the planks, rendering them liable to tilt with a weight on them. The vessel was being loaded and unloaded by a stevedore, named Manning, employed by the defendant under a special contract, furnishing and paying his own men and machinery, and furnishing, arranging and adjusting the gangway planks and blocks, to the exclusion of the crew. The chief officer saw that the cargo was properly stored and the ship properly trimmed. The stevedore and his men were all disconnected with the vessel. On the night of the accident, the plaintiff, in making his rounds, stepped on the ends of the planks, which gave way by reason of the vessel's falling with the tide, and he was thrown into the water, and his leg was broken.

The following were the points of the plaintiff's counsel and the answers of the court :

* See *Biley v. State Line Steamship Co.* (39 La. Ann. 791), 29 Am. Rep. 349; *Cunningham v. International Railroad Co.*, post.

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1. That it was the duty of defendants, as the employers of plaintiff, to exercise reasonable care and diligence in supplying him with safe machinery, and keeping the ways, passages and approaches, in and about his work and labor, in a safe and secure condition.

Ans. "I decline to affirm this point. It was not the duty of the employers to keep and maintain these planks in safe condition as regards the plaintiff. It is, of course, their duty to employ proper fixtures and machinery, and they are liable, if they have been guilty of any neglect or want of care in this respect."

2. That when an employer places the entire charge of his business, or a distinct branch of it, in the hands of a middleman, agent, or representative exercising no discretion and no oversight of his own, then the neglect by such agent or representative of ordinary care in supplying and maintaining suitable instrumentalities for the work required, is a breach of duty for which the master becomes responsible, and should be held answerable.

Ans. "If this point is intended to mean that when a person employs another in an independent employment, he is responsible, under all circumstances, to one of his employees for an injury caused by that person's negligence, I decline to so charge. He is responsible if he employs an agent, but not if he employs a person in an independent employment. That is the general rule."

3. That if the jury find that the defendants had left the entire charge of the business and management of the vessel, and of the keeping of the ways, passages, approaches and appliances thereto in a safe and secure condition in the hands of the master of the vessel, Captain Wiltbank, as their agent and representative, exercising no discretion and no oversight of their own, in that case, neglect by the master, of ordinary care in supplying and maintaining suitable machinery and instrumentalities for the work required of plaintiff, and in keeping the ways, passages, approaches and appliances in and about the same in a safe and secure condition, is a breach of duty for which the defendants would be responsible to plaintiff if he received injury through such neglect.

Ans. "I do not understand what is meant in this point by suitable machinery, or how it is applicable to this case. The question is as to the displacement of a gangway. If it means that the owners are responsible to the plaintiff for an injury happening through the negligence of the captain and crew, I negative it."

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4. That if the jury find that the defendants had placed the entire charge of the business of loading and unloading the vessel in the hands of Mr. Manning, the chief stevedore, as their agent or representative, exercising no discretion or oversight of their own, in that case neglect by such agent or representative of ordinary care in supplying and maintaining suitable instrumentalities for the work required, and in keeping the ways, passages, approaches and appliances in and about the same in a safe and secure condition, is a breach of duty for which the defendants would be responsible in case plaintiff were injured thereby.

Ans. "When I employ a man to do a particular thing under my control, I am responsible for an injury caused by his negligence; but if I employ one whose trade it is to do that particular thing, and submit the whole to him, I am not responsible. That is the general rule. If it was the duty of the master and sailors to keep the decks clear of such obstruction, the owners would not be responsible to the plaintiff for the neglect of that duty, although they would be to a stranger."

6. That if they found that notwithstanding the position of Manning, the chief stevedore, he was merely a fellow-workman of plaintiff, and that the injury was caused by his negligence, then it will be for them to say whether his negligence was one of the risks which the plaintiff should be held to have assumed when he consented to act as watchman of the vessel by night.

Ans. "Manning was not a fellow-workman. He was not engaged in the same line of business. If the company is exempt from the consequences of his neglect, it is on the ground that Manning was in an independent employment."

7. That if they found that plaintiff's injury was caused by the negligence of the chief stevedore, and that as watchman of the vessel he was not a fellow-servant of the chief stevedore, but was working for the defendants in an entirely different employment, then the plaintiff is entitled to recover.

Ans. "I decline to affirm this point in the form in which it is put, because you must also inquire, if you find that the negligence was originally that of the stevedore, whether leaving the planks in that condition was negligence on the part of the master and sailors, and if it was, plaintiff cannot recover." The court charged:

"There are certain fundamental principles of law which it is necessary to consider in all cases of this character. This is an action

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against the steamship company for alleged negligence on the part of their agents. Undoubtedly the general rule is, that a principal is responsible for an injury happening by the negligence of his agents. But this rule is subject to certain qualifications and limitations. In the first place, the plaintiff, in an action of this kind, must prove negligence on the part of the employer or his agents, and he must also prove that the accident was occasioned by it. Again, it is a rule of law, that in a case of this kind, if the plaintiff has himself been negligent, then he cannot recover, although there may have been negligence on the part of the master also. Where the person injured is partially to blame himself, he cannot recover damages, although his employer also has been negligent. If there was contributory negligence, if his own acts assisted in producing the accident, he cannot recover.

"A man, when he enters upon any employment, assumes all the risks which ordinarily and naturally belong to that business. For example, if an employer has taken proper care in the selection of his engineer, and the engine or boiler explodes, and the engineer is hurt, he cannot recover. It is a risk which he took. So it is with a sailor. He takes the risk which is ordinarily incident to his occupation.

"From the evidence it seems to me that the plaintiff was acting as a sailor. He was a watchman, it is true, but he was watching as a sailor. It is his duty to go on watch when directed by the master, whether in port or on sea. The master is a sort of tyrant on board of his vessel. He has the right to give such orders as he pleases. If commanded so to do by the master, the plaintiff would have been obliged to watch the ship just as much in the port of New Orleans as at sea. It seems by the testimony that the sailors regard the duty of watchman while in port as rather desirable. They enjoy certain privileges and exemptions from duty in consequence of it.

"But a man does not assume risks which are not such as naturally belong to his employment, and are occasioned by the negligence of his employer. He does assume all risks arising from the negligence of persons employed in the same common employment with himself. It is one of the risks which he undertakes when he enters upon the employment. If this accident was caused by the negligence of any person engaged in a common employment with himself, such as the captain and sailors, plaintiff cannot recover.

"Again, where a man employs another, who is engaged in a separate or independent employment, he is not responsible for the negligence of that person, whereby another person is damaged. A bricklayer, building your chimney, lets a brick fall upon another person's head — you had no control over him — it would be unjust to hold you responsible. If I am in my carriage, and my driver negligently drives over another, whereby he is injured, I am responsible, for he is my servant. If I am in an omnibus, I am not responsible for the negligent driving of the driver. This is the case where the employer exercises no control over the employed.

"The plaintiff must prove that the accident occurred through the negligence of the company or its agents. If it arose from the negligence of a person employed by the company in an independent employment, then the defendants are not liable.

"If this accident resulted from the negligence of any of the sailors, or persons employed in a common employment with the plaintiff, then he cannot recover.

"Of course, if it was the plaintiff's duty to have looked out after those gang-planks himself (and Captain Young says it was; you will judge from the evidence), then undoubtedly he cannot recover, for that would be to permit a man to recover for the consequences of his own negligence. Even if the stevedore was negligent, if the negligence of the plaintiff was the immediate cause, your verdict must be for the defendants. * * * * *

"The defendants say that the arrangement of the planks was a thing which was committed by them to the stevedore, who was in an independent employment; that he was employed to do that very thing, and that defendants had no control over him. He did it in his own way, and with his own men. The plaintiff, on the other hand, says that he was an agent of the company. If he was merely an agent, that is, if he was a simple agent, the defendants are responsible; but if he was a person engaged in an independent employment, then the defendants would not be responsible for his negligence in the course of that employment.

"The defendants would, in my judgment, have been responsible to a stranger if the planks were improperly left by the stevedore in a dangerous condition, and an accident had happened to him from that cause, because if so left the defendants would be responsible to a stranger for the negligence of the master or crew in not removing them. But I cannot say that as regards a sailor employed on board.

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"If it was the duty of the master, or of the ship's crew to remove these boards, then the defendants are not responsible in this suit. The owner's responsibility is limited to the duty of employing competent persons. If he does that, he is not liable. The defendants are not responsible for the negligence of the captain or crew, if it caused this injury, and if the accident happened through the failure of the captain or crew to attend to their duty, defendants are not liable. If a sailor, or even the captain, leaves any thing wrong on deck, and an accident happens, the employer is not liable to one of the sailors for that. That is the negligence of a person in the same employment. It would otherwise amount to this, that owners of a vessel guarantee to sailors safety from the negligence of the officers or sailors.

"1st. You are to find whether the defendants were negligent.

"2d Was there any negligence on the part of plaintiff? He says he had walked over the planks once that night and they tilted with him. Was he warned, and was it negligence in him to walk over them again? I say again, that if the negligence was originally the stevedore's, and the stevedore was in an independent employment, then the defendants are not responsible if the accident happened in consequence of a neglect on the part of the captain or crew to remove the planks. If it was the duty of the plaintiff to have removed this obstruction himself, then of course he cannot recover. Nor can he, if it was the business of the captain or crew to do so. If on the other hand, the accident is exclusively attributable to the negligence of the defendants, then the plaintiff ought to recover."

Defendant had judgment below.

Edward F. Pugh and *George P. Rich*, for plaintiff in error. When plaintiff entered upon his duties, he had the right to expect from his employers, the defendants, that the deck on which he was to walk for the purposes of his employment, and the planks which he was to watch in that employment, should be in a safe and secure condition; that there should be, through negligence, no trap exposing him to the risk of injury. They were bound to the exercise of reasonable care and proper diligence that it should not be in an unsafe and dangerous condition, either through their own negligence or through the negligence of any deputy master, agent or representative put by them in their place in charge of their business, and

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clothed with their powers and duties. *Weger v. Pennsylvania Railroad Co.*, 5 P. F. Smith, 460; *O'Donnell v. Allegheny Valley Railroad Co.*, 9 id. 239; *Johnson v. Bruner*, 11 id. 58; *Ardesco Oil Co. v. Gilson*, 13 id. 146; *Mullan v. Philadelphia & Southern Mail Steamship Co.*, 78 id. 25; s. c., 21 Am. Rep. 2; *Patterson v. Pittsburgh & Connellsville Railroad Co.*, 26 P. F. Smith, 393; s. c., 18 Am. Rep. 412; *Walker v. Bolling*, 22 Ala. 294; *Grizzle v. Frost*, 3 F. & F. 622; Shearm. & Redf. on Neg., § 102; Whart. Law of Neg., § 229. When the law imposes a specific duty upon an individual, that duty cannot be evaded, or the exclusive responsibility for its non-performance or imperfect performance be thrown upon a contractor. *Storrs v. City of Utica*, 17 N. Y. 104; *Hole v. Sittingbourne, etc., Railroad Co.*, 6 H. & N. 488; *Blake v. Thirst*, 2 H. & C. 20; *Allen v. Willard*, 7 P. F. Smith, 383; *Homan v. Stanley*, 16 id. 464; s. c., 5 Am. Rep. 389. The master is not a fellow-servant in a common employment with his seamen. Shearm. & Redf. on Neg., § 102. He is the agent of the owner, and his negligence is the owner's.

Morton P. Henry, for defendant in error.

PER CURIAM. A careful examination of the charge of the learned judge below, and of his answers to the plaintiff's points, has satisfied us that none of the assignments of error in this case ought to be sustained. The decision of this court in *Mullan v. Steamship Company*, 78 P. F. Smith, 25; s. c., 21 Am. Rep. 2, was closely followed. It was left to the jury to find whether the chief stevedore, Manning, was a simple agent—with the instruction that if he was, the company was liable; but not if he was in an independent employment. If however the accident resulted from the negligence of the master or crew, then the company was not liable to another of the crew. There was no evidence in the cause that the company had placed the entire charge of its business in the hands of either the master or chief stevedore, so as to make the negligence of either their negligence. The entire case was properly submitted to the jury as presenting questions of fact for their decision. We must take the whole charge and answers together, and not separate parts by themselves.

Judgment affirmed.

MOORE'S APPEAL.

(88 Penn. St. 450.)

Deed—"under and subject" to mortgage.

Where lands are granted "under and subject" to a mortgage, and there is no express agreement by the grantee to pay the incumbrance, and there are no circumstances from which such an agreement can be implied, the words amount simply to a covenant of indemnity.*

APPEAL from a decree upon an administrator's account. The opinion states the point. The auditor refused to direct the payment of the principal of a mortgage debt out of a personal estate in the hands of the administrator, on the ground that the decedent was under no personal liability to pay the mortgage.

George W. Thorn, for appellant. Where realty is conveyed expressly subject to a mortgage debt recited in the conveyance, the debt becomes the personal one of the vendee. *Keyzey's case*, 9 S. & R. 71; *Campbell v. Shrum*, 3 Watts, 60; *Blank v. German*, 5 W. & S. 36; *Hoff's Appeal*, 12 Harr. 201; *Woodward's Appeal*, 2 Wright, 325; *Burke v. Gummey*, 13 id. 518, *Lennig's Estate*, 2 P. F. Smith, 135; *Taylor v. Preston*, 29 id. 436.

J. G. Johnson, for appellees.

SHARSWOOD, C. J. The personal estate of a decedent is the primary fund for the payment of his debts. One reason and perhaps the controlling one for this rule is, that the personal estate has been increased by means of them, and his intention is therefore presumed to be that it should bear the burden, unless he has expressed a contrary intention by his will. If therefore he has incumbered his land, the heir or devisee is entitled to call upon the personalty for exoneration. Where, however, his land has been purchased, incumbered by the debts of a prior owner, this reason does not exist and *cessante ratione cessat et ipsa lex*. *Keyzey's case*, 9 S. & R. 71. Yet if he has made himself directly liable for the debt for which the incumbrance was created, there the exception does not apply, but the general rule prevails. *Lennig's Estate*, 2 P. F. Smith. 135. It

*To same effect, *Fluke v. Tolman*, (124 Mass. 254), 28 Am. Rep. 660, and note, 660.

seems, however, that indemnifying his vendor against being called on to pay the debt, upon the land proving to be insufficient, is not an act which makes him personally liable to the creditor and thereby throws the debt upon the personality. *Evelyn v. Evelyn*, 2 P. Wms. 664, note by Cox. A mere covenant by the purchaser of a mortgaged estate to indemnify the vendor does not make it his personal debt. *Wood v. Huntingford*, 3 Ves. 131. These cases have been recognized by this court in *Hoff's Appeal*, 12 Harr. 204.

The decedent in his life-time purchased a house and lot for \$9,500 and the habendum contained these words: "Under and subject nevertheless to the payment of a mortgage debt of \$8,500." The receipt at the foot of the deed was for "\$9,500, being the full consideration." The value of the property, clear of the incumbrance, was \$18,000. The question then is, did the decedent make this mortgage debt his own so as to entitle his heir to call upon the personal estate to exonerate the land?

An examination of the cases which have been decided on the legal effect of such a clause in a conveyance shows, we think, that unless there exist special circumstances to raise a covenant to pay the incumbrance, it amounts only to an indemnity to the vendor; in the language of the opinions "the vendee makes the debt his own as between him and the vendor for his protection." "We have no cases," says Mr. Justice STRONG, in *Burke v. Gummey*, 13 Wright, 518, "that are not reconcilable with the doctrine that one who purchases expressly subject to an incumbrance, as between the vendor and himself, makes the debt his own and assumes to protect the vendor." *Blank v. German*, 5 W. & S. 36; *Walker v. Physick*, 5 Barr, 193; *Keim v. Robeson*, 11 Harr. 456; *Academy v. Smith*, 4 P. F. Smith, 130; *Taylor v. Preston*, 29 id. 436. Wherever it has been construed as a covenant to pay the incumbrance, which can inure to the use of the incumbrancer and on which he can sue, either in his own name or that of the vendor, there has been an agreement to pay, either express or implied, from the circumstances. Such an implication arises in most cases where there is a sale by a vendee under articles subject to the payment of the unpaid purchase-money. Thus, in *Campbell v. Shrum*, 3 Watts, 60, Mr. Justice SERGEANT says. "Here the principal consideration for Shrum's agreement to transfer to Campbell was that Campbell should discharge the arrears due by Shrum for the land, and relieve and exonerate him from his liability therefor." Such was *Metzgar's Appeal*, 21 P. F. Smith, 330.

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The conveyance was subject to a dower and the yearly interest to be paid to the widow and payable after her decease to the heirs. In *Taylor v. Preston*, 29 P. F. Smith, 436, also a sale of land held under articles, there was evidence that the grantees were to pay \$20,000 and assume all the back payments. In *Hoff's Appeal*, 12 Harr. 200, in the receipt subjoined to the conveyance, it was stated that the payment in hand, and the mortgage debt and interest due and to grow due thereon, "to be paid by the said John Hoff," the grantee, was the consideration for the premises. In *Lennig's Estate*, 2 P. F. Smith, 135, the property was purchased for \$57,000, which sum, the contract stated, included the two mortgages of \$12,000 and \$25,000. *Woodward's Appeal*, 2 Wright, 322, much relied on as establishing a personal liability, only decided that where a guardian, by authority from the Orphans' Court, purchased land at the request and for the use of his ward, and took the conveyance under and subject to a mortgage, that court as a court of equity would protect her from possible eventual responsibility to the vendor, by ordering the mortgage to be paid out of the ward's personal estate, though the consequence was that the land descended to the heir unincumbered. It was expressly said in the opinion by Mr. Justice STRONG, in that case, "It is of no importance now to inquire whether Mr. Woodward, by taking a deed from Mr. Spackman for the Arch street house "subject to the mortgage thereon," assumed the debt as between the grantor and himself, or whether she only engaged to indemnify him against being called upon to pay it. If it was either, it was a liability incurred in behalf of her ward, and a liability incurred in obedience to the directions of the Orphans' Court."

Why should a covenant be inferred from these words by the vendee to the vendor to do more than protect the latter from loss? If there is no existing personal liability in the vendor by reason of his bond or promise, under which he can be compelled to pay if the mortgaged premises prove insufficient, what reason is there that he should exact a covenant from his vendee for the benefit of a stranger? If such personal liability does exist, why should he exact any thing more than indemnity? Surely then something should appear to create the inference of such a covenant. The words "under and subject" import no such thing. They import that the vendee takes the land incumbered, and at most that so taking it, at an agreed consideration, which includes the incumbrance, he will indemnify the vendor to the extent of that consideration, in

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the same manner as if it had been paid in cash and so applied at the time. It is unwise to give an arbitrary, artificial meaning to words commonly used in contracts and conveyances, and thus entrap parties into engagements into which they had no reason to suppose, in the common use of language, they were entering. The Act of Assembly of June 12th, 1878, Pamph. L. 205, has very wisely provided that the grantor shall not be personally liable unless he shall expressly assume such liability by agreement in writing, or condition in the conveyance.

We think the conclusion at which the auditing judge and the court below arrived was right.

Decree affirmed and appeal dismissed at the costs of the appellant.

Decree affirmed.

HESTONVILLE PASSENGER RAILWAY CO. V. CONNELL

(88 Penn. St. 520.)

Negligence — infant.

A child six years and nine months old, running at large in the street, suddenly and unexpectedly attempted to mount the front platform of a street car, and was injured thereby. The driver, who was also conductor, was on the rear platform at the time, engaged in putting off another boy who was hanging on in a dangerous position. There was no fender on the front platform. *Held*, that *prima facie* there was no negligence to warrant a recovery.*

ACTION of damages for negligence. The opinion states the facts. The plaintiff had judgment below.

Henry Hazlehurst and E. Spencer Miller, for plaintiffs in error.

J. Carroll McCaffrey and J. J. Murphy, for defendant in error. A child is responsible only for such a degree of prudence as is consistent with a person of his years. *Railway Co. v. Caldwell*, 24 P. F. Smith, 424; *Pennsylvania Railroad Co. v. Kelly*, 7 Casey, 372; *Smith v. O'Conner*, 12 Wright, 218; *Rauch v. Hill*, 7 Casey, 358; *Crissey v. Hestonville Railroad Co.*, 25 P. F. Smith, 86; *N. P. Rail-*

*See *Nagle v. Railroad Co.*, ante; *Kansas Cent. Ry. Co. v. Fitzsimmons*, 23 Kans. 681; A. C., 31 Am. Rep. 203, and note, 206.

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road Co. v. Mahoney, 7 id. 187; *Philadelphia City Passenger Railroad Co. v. Hassard*, 25 id. 367; *Reading Railroad Co. v. Spearen*, 11 Wright, 300.

Where the danger was open and exposed on the public highway, and was not guarded as it should have been, by either the presence of a fender or of a driver at the front of the car, it cannot be seriously contended that the plaintiffs in error were managing their car with due care and caution. *Railway Co. v. Hassard*, *supra*. Being a trespasser does not defeat the right of recovery. *Burge v. Gardiner*, 19 Conn. 507.

GORDON, J. As we gather from the evidence and from the statements of counsel, on the 3d day of March, 1877, at about 11 o'clock, A. M., as the car of the defendant below was passing along Lancasteravenue, between Fifty and Fifty-first streets, William Connell, the plaintiff, a child of six years and nine months of age, in attempting to jump or climb upon the forward platform, slipped, fell and received the injury complained of by the car passing over him. This was a one-horse reversible car, having both platforms unclosed, as is customary with such vehicles, and was in charge of but one person, who acted both as driver and conductor. The car was going slowly, and the driver was, at the time of the accident, engaged upon the rear platform and did not observe the child until after it was hurt. There is therefore no doubt that the accident resulted directly from the plaintiff's own trespass, and young as he was, had the damage resulted to the defendant's property instead of to the plaintiff's person, he would have been answerable therefor. *McGee v. Willing*, 31 Leg. Int. 37, per SHARSWOOD, J. True, this rule is not based on any supposed discretionary ability on the part of the infant, but rather upon the principle that every one is liable, in a civil suit, for any damage he may occasion, though the act producing it may have been unintentional or even accidental. Hence it is, that though an infant may be responsible for its trespass, yet ordinarily, negligence cannot be imputed to one so young as the plaintiff, since but little can be predicated of its intelligence or discretion; nevertheless, it may be assumed that a child, old enough to be trusted to run at large, has wit enough to avoid ordinary danger, and so persons who have business on the streets may reasonably conclude that such an one will not voluntarily thrust itself under the feet of his horses or under the wheels of his carriage; *a fortiori*, may they

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conclude that they are not to provide against possible damages that may result to the infant from its own willful trespass? All this, however, bears only on the inquiry concerning the defendant's negligence; concurrent negligence in one of the plaintiff's age being out of the question; hence our investigation is confined to the conduct of the defendant's employee and the character of the vehicle used, for upon these the court below allowed the case to turn. It was left as a question of fact to the jury, whether the want of a fender on the front platform, and the absence of the driver from the forward part of the car, was, under the circumstances, negligence. *Prima facie*, there was neglect in neither of these things. The road, designed as it was, for the accommodation of suburban parts of the city where the travel is limited, could not have first-class appointments; it must be run cheaply or not at all; hence its cars were drawn by single horses and supervised by single persons, and as they were used without turn-tables, their platforms must of necessity be open.

In all this there was nothing either unlawful or dangerous. The remaining question is, what misuse was there of these lawful appliances and arrangements, from which a presumption of negligence might be raised? If, as in the case of the *Railway Co. v. Hassard*, 25 P. F. Smith, 367, improper use had been made of the open platform by permitting the child to leave it whilst the car was in motion, or had it been in the car, and had the driver neglected any duty in respect to it, in either case, a question of negligence would have been raised which properly could be determined only by a jury. This however is not the question here presented; it is rather whether this company was bound to the use of extraordinary care for the sole purpose of preventing injury to trespassing children. It is not a case of mere negligence on the child's part, as if it had been run over whilst crossing or playing in the street; that would raise a question very different from the one in hand. The accident here complained of could not have happened but by the direct act of the plaintiff in his sudden and improper attempt to board the car, and this when the car was moving slowly and when the driver had no reason to anticipate danger to any one, young or old. Certainly this one-horse street car, moving quietly along the open avenue, was not in itself an object of such a character as to awaken the slightest alarm or apprehension in the mind of any one, however cautious, and therefore called for no more than ordinary care.

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in its management. It is hence manifest that this accident occurred, not because of any defect in the vehicle, nor from the neglect of the person who had charge of it, but from the sudden and unanticipated act of the child itself, which could neither be foreseen nor guarded against, and it is a fact that the thoughtless impulse of a child may bring about an accident for which even a railroad company will not be held liable. *Philadelphia & Reading Railroad Co. v. Specren*, 11 Wright, 300.

The mistake, in the present case, was in assuming that the proximate cause of the injury complained of might be found in the structure or management of the car, whereas, as we have shown, the car itself was properly constructed and it was properly used in the ordinary and customary manner, and had the plaintiff not attempted to board it in a rash and unexpected manner no harm would or could have occurred.

This case is, in fact, but a repetition of the one above cited, and the accident was one resulting from childish indiscretion alone, and for it the defendant is not responsible.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

DUNCAN V. BARNETT.

(11 S.C. 333.)

Constitutional law — statute enlarging exemption from execution.

The legislature cannot create new subjects of exemption from execution, in addition to those enumerated in the Constitution.

THE opinion states the case.

R. W. Shand, for appellant, cited *Cates v. Knight*, 3 T. R. 443; *Smelt. Lead Co. v. Richardson*, 3 Burr. 1344; *C. & A. R. R. Co. v. People*, 67 Ill. 11; s. c., 16 Am. Rep. 599; *Test Oath Cases*, 2 Hill. 1, and Mr. Grimke's argument at p. 17; Smith on Const. Law, § 508; Cooley on Const. Lim. 64, 94, note 1, 195, note 3, and 599.

WILLARD, C. J. The Circuit Court discharged a rule against the sheriff for failure to enforce an execution against personal property, consisting of cotton in bales, seed cotton and corn, the defendant claiming that they are exempt from levy under the provisions of the act of March 13th, 1872 (15 Stat. 229, § 9), he being an "agricultural laborer." It is stated in appellant's argument, that the contract upon which the judgment was obtained bore date

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prior to the passage of the act in question, contending that such exemption could not be claimed as against an antecedent contract; but that fact does not appear in the brief, and therefore is not available to the appellant.* The question to be considered is, whether the legislature could create new subjects of exemption in addition to those enumerated in the Constitution. The provisions of the Constitution relating to the exemption of personal property from execution are contained in article II, section 32. After providing for a homestead exemption on the land of a debtor, the Constitution goes on to say: "To secure the full enjoyment of said homestead exemption to the person entitled thereto, or the head of any family, the personal property of such person of the following character, to wit, household furniture, beds and bedding, family library, arms, carts, wagons, farming implements, tools, neat cattle, work animals, swine, goats and sheep, not to exceed in value, in the aggregate, the sum of five hundred dollars, shall be subject to like exemption as said homestead; and there shall be exempt in addition thereto all necessary wearing apparel." The question is, whether the subsequent attempt to add to the list of articles exempted "one-third of the annual products of agricultural laborers" by the act of 1873 was consistent with the provisions of the constitutional enactment, or tended to deny the proper force due to the same; and if the latter conclusion is reached, such conflicting provisions must be held unconstitutional and void.

This involves a question of intention to be made out constructively on the provisions of the Constitution. It is contended that the enumeration of kinds of property intended for exemption is exclusive, and general rules of interpretation are urged as leading to that conclusion. It will not be necessary to resort to such general rules, or to place the decision on any technical rule or reasoning, as the nature of the subject with which the Constitution deals points very distinctly to the solution of the question at issue.

The question of allowing the legislative exemption to debtors is, in its nature, fundamental, as involving an inquiry into the principles of government. Until within a few years it has not been regarded as a legitimate exercise of legislative power to place the property of the debtor beyond the reach of his creditor, except to an inconsiderable extent. Not that the competency of the legislature to make such exemptions, independently of constitutional re-

* See on this point, *Wilson v. Brown* (58 Ala. 62), 29 Am. Rep. 737.

strictions, was doubted, but because the spirit of the laws was supposed to oppose such exercise of legislative power. It may well be considered that in solving the question of the legitimacy of such legislation, the Constitution had in view a limit that should be imposed to its unrestricted exercise. When it is treating of subjects that have been constantly dealt with by legislative bodies, with the sanction of the courts and the community, such an inference does not necessarily arise.

In such cases some special ground would have to appear by inferring, in the absence of an express declaration to that effect, that the Constitution, in prescribing the mode in which a power of that class should be exercised, intended to exclude its exercise in any other mode. But in the present case, where the Constitution was dealing with a principle fundamental to the policy of our jurisprudence, and which, by its abuse, might unsettle the very cornerstone on which that jurisprudence rests, it is obvious that in imposing limits to such power of exemption regard was had to the general question, to what extent government should go in relaxing the laws for the enforcement of obligations. There can be no doubt that the object of the section in question was to limit the legislature. If the Constitution had been silent altogether on the subject, the legislature would have doubtless been competent, as affecting future contracts, to create such exemptions, and to give them any measure of extent that might appear desirable.

Again, article I, section 20, confers express powers on the legislature to grant homestead exemptions to a reasonable extent, leaving the determination of what is to be regarded as reasonable to the legislature, so far as unfettered by subsequent clauses of that instrument. If that section had stood alone it would leave no doubt as to the power of the legislature being unrestricted. But the Constitution was not content with establishing this as a principle, and in article II, section 32, assumes to give a more accurate definition of the kind of legislation contemplated in the twentieth section of article I, enumerating the subjects to which it should extend and the limitations that should be established as affecting these subjects. Such a definition, as applied to a kind of legislation not sanctioned at the time of the adoption of the Constitution, but introduced by that instrument, must be regarded as intending limitation of the legislative authority. True, it is not the case of a power entirely new and not before capable of being exercised,

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given upon conditions and subjected to limitations, in which case such conditions and limitations must be regarded as limitations of the right of exercise as well as the mode of exercise; but it is a case within the same principle as calling into exercise a function of general legislation that had lain dormant through the conviction that it was not a legitimate exercise of legislative power consistently with the principles of our jurisprudence. This view leads us to the conclusion that the exemptions allowed by the Constitution cannot be extended or restricted by any act of the legislature. This view does not conflict with what was said in *Homestead Building and Loan Association v. Enslow*, 7 S. C. 20, where, speaking of the degree of authority possessed by the owner of lands in which a homestead might be claimed, to incumber his land, it is said, "whether the legislature had not the right to extend the measures of relief afforded to the heads of families by the section above cited, under a more general grant of legislative authority set forth in article I, section 20, of the Constitution, need not be considered, for no such exercise of authority beyond the limits of article II, section 32, has been attempted." This is a question suggested, with no answer to it given; but it was not directed to the question whether the legislature could afford relief beyond the limits imposed by the Constitution, but a more full relief within those limits. We must conclude that the provisions of the act of 1873, so far as they attempt to extend the exemption to a class of personal property not embraced in article II, section 32, are unconstitutional and void. The discharge of the rule must be set aside, and the cause remanded for proceedings conformable herewith.

Motion granted.

McIVER and HASKELL, A. JJ., concurred.

WEBB V. GRANITEVILLE MANUFACTURING CO.

(11 S. C. 386.)

Corporation — transfer of stock — imputed knowledge through president

The infant plaintiffs owned stock in the defendant corporation, standing in the name of "P., guardian." The guardian placed the certificate with a blank indorsement in the hands of D, his counsel, for purposes connected with his trust. D. procured an order of court permitting a sale and rein-

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vestment, and then hypothecated the certificate to the S. bank as security for a loan for his personal use. H., who was president of the bank, and also of the defendant, with another purchased the stock from the bank, and had it transferred by the defendant to the purchasers. *Held*; that the defendant was chargeable with knowledge of the trust and its beneficiaries and liable to respond to the plaintiffs for the stock.*

THE opinion sufficiently states the facts. The defendant had judgment below.

Tracy & Tracy, for appellants.

Buist & Buist, for respondents. Liability for illegal transfer is admitted, but here there is no knowledge of a trust. In *Magwood v. Railroad Bank*, 5 S. C. 379, and in *Second Reformed Pres. Church v. Disbrow*, 52 Penn. St. 223, there was such knowledge. But see *Albert v. Mayor*, 2 Md. 159, 168; 1 Md. Ch. Dec. 407; *Perry on Tr.*, § 242; *Lewis v. Adams*, 6 Leigh, 339; *Central R. R. Co. v. Waid*, 37 Ga. 515; *Tan. C. C. Dec.* 324; *Field v. Schieffelin*, 7 Johns. Ch. 150; *Barrett v. Cochran*, 11 S. C. 29.

These certificates of stock are negotiable instruments, and the company had no alternative but to make the transfer when demanded by a *bona fide* holder. *Hill v. Newichawanick Co.*, 48 How. Pr. 427; *State Bank v. Cox*, 11 Rich. Eq. 344; 11 Wall. 369. The corporation does not make the transfer; it only records the transfer, and gives certificates of the fact. The title becomes perfect in the vendee upon assignment of certificate. *Field on Corp.*, § 110; *McNiel v. Tenth Nat. Bank*, 46 N. Y. 325.

The crucial question is, did the mere word *guardian*, added to Paul's name, give the defendants notice of the trust? Such position of the appellants finds no support in the case relied on (*Bail. Eq.* 147) by them. In *Bailey v. Patterson*, 3 Rich. Eq. 157, and *Moore v. Hood*, 9 id. 311, relied upon by appellants to sustain position that guardian has no authority over ward's property, the property stood in the name of the wards, not in the name of the guardian. In *West. U. Tel. Co. v. Davenport* the transfer was a forgery, and illegal under statute of Ohio unless by order of the probate court.

WILLARD, C. J. Paul, the guardian of the infant plaintiffs, took from the defendant corporation a certificate of shares of the

* Compare *First Nat. Bk. of Hightstown v. Christopher* (11 Vroom, 425), 29 Am. Rep. 202.

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capital stock of that corporation belonging to his wards, in his own name as guardian. He placed it with a blank indorsement in the hands of Davant, his counsel, for purposes connected with his administration as guardian. Davant hypothecated the certificate to the Savings Bank of Augusta for money loaned for his personal use. Hickman, who was president of the bank, and also president of the Graniteville Manufacturing Company, purchased, with Giles, the stock from the bank, and had the stock transferred by the defendant corporation to such purchasers. To show authority on the part of Paul as guardian to sell the stock, an order of the Circuit judge of the Second Circuit was produced, claimed as authorizing the guardian to sell the stock for the purpose of changing the form of instrument. Objections were made to this order that need not be considered, for no sale of the nature authorized was made under it. As the title of the stock stood in the name of Paul and the beneficial interest in the plaintiffs, his wards, Paul was a trustee for plaintiffs' use. These relations were sufficiently declared by facts appearing on the face of the certificate and the books of the corporation. The stock, previous to the transfer to Paul as guardian, stood in the name of Fickling and Hill, as executors of Burwell McBride. The plaintiffs are the children of Burwell McBride. The transfer to Paul as guardian was made with full knowledge on the part of the corporation of the source from which information might have been derived as to the persons represented by Paul, and it must be assumed that the defendant corporation either had full knowledge of the persons entitled as beneficiaries under the trust, or improperly neglected to inform themselves on such subject. The company were therefore apprised of the rights of the parties, and occupy the same position as that of the defendants in *Magwood v. Bank*, 5 S. C. 379. Hickman could only derive title through the order of the Circuit judge, as he was chargeable with notice of the guardianship from the certificate itself, and as we have just held, the guardian had no authority to sell the plaintiffs' beneficial interest in stock constituting an investment, independently of an order of the court for that purpose. *McDuffie v. McIntyre*, *post*. The order discloses all that was essential to charge Hickman with full notice of the rights of the plaintiffs, both as wards of Paul and under the trusts with which he was charged. As Hickman's alleged title flows through that order, he is chargeable with notice of its contents. The order did not authorize the guardian

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to hypothecate the stock for the purpose of borrowing money. Such a transaction is neither within the terms or intention of the order, and cannot be justified under it. It must be assumed that Hickman saw the order and the proceedings upon which it was made, and from that he would be informed that Davant was the solicitor of Paul. In the absence of evidence showing that Hickman had reason to believe and did believe that Davant was a purchaser from Paul of the stock for a fair consideration, it must be assumed that Hickman dealt with Davant as the solicitor or agent of Paul. To hypothecate the stock was a breach of trust. If Hickman supposed that Davant had authority from Paul to hypothecate the stock, which is the assumption most favorable to Hickman, then his action must be regarded as assisting Paul to commit a breach of trust. As Hickman was president of the defendant corporation, that defendant is chargeable with notice of such breach of trust. It is in that case an instance of knowledge brought home to the agent of a corporation possessing full authority to act and actually acting as such in the matter to which the notice relates — the strongest case for charging a corporation with notice of matter known to its agent. It is unnecessary to consider the questions discussed by the Circuit judge, as they have no real application to the facts of the present case. The plaintiffs have lost their estate through a series of wrongful acts that would have been ineffectual for that purpose but for the transfer of the stock on the books of the defendant corporation, and by the exercise of reasonable prudence and care on their part the loss might have been prevented.

The judgment dismissing the complaint as to the Graniteville Manufacturing Company must be reversed and the cause remanded to the Circuit Court for judgment for the plaintiffs against both defendants.

Decree reversed.

MC IVER and HASKELL, A. JJ., concurred.

LYONS V. HOLMES.

(11 S. C. 489.)

Evidence—of writing of deceased marksmen and attesting witnesses are dead.

A deed, executed by a grantor making her mark, she and the attesting witnesses being dead, is well proved by evidence of the handwriting of the attesting witnesses, with other confirmatory evidence, and proof of the grantor's signature is not necessary.

ACTION to recover land. The opinion sufficiently states the point. The defendant had judgment below.

W. A. Clark, for appellant.

J. D. Pope, for respondents. The first proposition, that in the case of the death of the attesting witnesses it is not only necessary to prove their signatures, but that the signature of the grantor must also be proved, will hardly be called in question. Steph. Dig. Ev., art. LXVI, pp. 121-122; App. 221.

2. The second proposition, that when the deed is executed by making a cross (+) mark, and the witnesses are dead, the death of the witnesses being proved and the signatures proved, it is also necessary to prove the identity of the grantor as the real person who was present and made the mark, thus connecting him personally with the mark so purporting to be made by him, is, we think, equally conclusive.

Why does the rule require that in case of death the signature of the grantor should be proved? It is to identify and connect the grantor with the deed. So, in the case of the marksman, the mere mark cannot do this. Any one may have made the mark. It has no character to distinguish it; and therefore the marksman must be identified in person as the one who actually made the mark as his signature. That certainly is the rule in England. *Parkins v. Banks*, 2 Stark. iv, 239; *Nelson v. Whittall*, 1 B. & Ald. 19; *Whitlock v. Musgrove*, 1 Exch. 511.

In South Carolina we have to the same point, *Trammell v. Roberts*, 1 McM. 305; *Plunkett v. Bowman*, 2 McC. 138; *Paisley v. Snipes*, 2 Brev. 200. And the last case upon the subject, where the English

and South Carolina authorities are reviewed by Judge Withers. *Knotts v. Hydrick*, 11 Rich. 318.

McIVER, A. J. The question in this case is whether the testimony offered by the plaintiff to prove the execution of a deed from Sarah Hane to the plaintiff's testator, Henry Lyons, was sufficient to allow the case to go to the jury. The Circuit judge, not regarding the testimony as sufficient, nonsuited the plaintiff, and upon that error is assigned. The deed in question purports to have been signed by Sarah Hane with a (+) mark, in the presence of two subscribing witnesses, both of whom were dead at the time of trial. It bears date June 5th, 1855, and appears to have been duly proved and recorded on the day of its date. The plaintiff proved the handwriting of the two subscribing witnesses and their death, and also proved by Levin, that as agent of the plaintiff, he paid the State and city taxes on the lot in controversy, which said deed purports to convey, from the year 1866, when plaintiff left the city, until the year 1869 or 1870, upon an understanding with Richard Holmes, who was the husband of Sarah Hane, that he would refund the amounts so paid, as he had agreed with the plaintiff to pay the taxes as long as he occupied the premises; and that he continued to pay the taxes until the defendants raised the question as to the ownership of the property. R. D. Senn also proved that the said Richard Holmes, under whom the defendants claim, executed in his presence a paper, of which the following is a copy:

"The sale of the lot, made by my wife Sarah, to the late Henry Lyons, deceased, has my consent, with the verbal conditions this day reduced to writing by J. C. Lyons.

(Signed)

"R. HOLMES

"COLUMBIA, March 14th, 1860."

Witnessed by R. D. Senn, who testified that at the execution of this paper there was some talk between Lyons and Holmes about the occupancy by Holmes and wife of the lot of land now in controversy, but he could not say what were the precise terms of the verbal conditions which this paper shows were that day reduced to writing. It seems to us, that even under the most stringent rule which can be deduced from our cases, the testimony offered was amply sufficient to allow the question of the execution of the deed to go to the jury. The deed bore date more than twenty years before

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it was offered in evidence, and for that length of time it had been spread upon the public records of the country. All the parties to it were dead, including both of the subscribing witnesses. The supposed grantor was not only an illiterate woman, unaccustomed to write, but actually unable to write. All this, taken in connection with the testimony of Levin and Senn, afforded much stronger proof than that which has been held sufficient in some of our cases. In *Hopkins v. De Graffenried*, 2 Bay, 187, the question, as in this case, was whether the testimony offered to prove the execution of a deed was sufficient to go to the jury. The deed purported to have been executed by Thomas and Dorothy Moore, and the handwriting of the two subscribing witnesses, one of whom was dead, and the other out of the State, was duly proved, as was also the handwriting of Thomas Moore, but the handwriting of Dorothy was not proved. The court, while admitting the general rule of law "as laid down in 3 Burr. 1247, and Doug. 89, 90 (which, however, will be found not to lay down any such rule), that it is necessary after you have proved the handwriting of the witnesses, then to prove the handwriting of the party to the bond or deed," said that this case formed "a strong and marked exception to the general rule," because the handwriting sought to be proved was that "of an old and infirm woman who did not sign her name more than once probably in fifty years, and it was next to an impossibility to find a man living who could prove her handwriting," and therefore they applied the rule that "where the best evidence a thing is capable of cannot be procured, then the next best ought to be admitted, not as conclusive but as presumptive evidence of the fact." The nonsuit was therefore set aside in order that the testimony might be submitted to the jury. So in *Young v. Stockdale*, 2 McC. 531, a deed twenty-six years old, but whether recorded or not does not appear, was held to be sufficiently proved by proof of the handwriting of the grantor and one of the subscribing witnesses, all the parties being dead, and the other subscribing witness, a young man at the date of the deed, and his handwriting unformed, and therefore very difficult if not impossible to be proved. In *Shiver v. Johnson*, 2 Brev. 397, it was held that where the maker of a note signs by his + mark, and the subscribing witness is out of the State, proof of the handwriting of the witness will be sufficient proof of the execution of the note, "from the necessity of the case." To the same effect is *Bussey v. Whittaker*, 2 N. & McC.

374 ; see also *Collins v. Lemastus & Lee*, 2 Bail. 141, for a case in which very slender proof was not only allowed to go to the jury, in proof of the execution of a bond signed by a marksman, but which, upon appeal, was held sufficient to sustain the verdict, notwithstanding the fact that the evidence adduced by the defendant, after his motion for a nonsuit was overruled, contradicted that offered in behalf of the plaintiff.

There does appear to be some conflict in the decisions in this State as to what shall be sufficient evidence of the execution of an instrument to which there are subscribing witnesses, when the testimony of such witnesses cannot be obtained, but such conflict arises mainly, as we think, from the fact that certain *dicta* are thrown in in some of the cases, which in subsequent cases are erroneously quoted as authority. The case of *Oliphant v. Taggart*, 1 Bay, 255, decided in 1792, which is sometimes cited to show, that in this State it is necessary to prove the handwriting of the obligor or grantor, as well as that of the subscribing witnesses, seems to be the first case upon the subject. The case however does not establish any such doctrine. The action was upon a bail bond, purporting to have been executed in the presence of one witness who had left the country prior to the trial. The plaintiff offered to prove the handwriting, not only of the witnesses, but also that of the obligor ; but the counsel for the defendant objected, "under the circumstances of the case," and produced the affidavit of the subscribing witness, made prior to his departure for France, in which he swore positively that he had never seen the defendant sign the bond in question. Thereupon the court said that the evidence offered was legal and proper, but, in view of the fact stated in the affidavit submitted, it would be improper to let the case go to the jury then, and directed a commission to issue for the examination of the subscribing witness. The next case is that of *Hopkins v. De Graffenreid*, decided in 1798, *supra*, which has already been commented on. *Hopkins v. Albertson*, 2 Bay, 484, decided in 1803, simply holds that in order to prove a will as a link in a chain of title to real estate, where all three of the subscribing witnesses are dead, it is necessary to prove the handwriting of all three of the witnesses, but no question was raised, and nothing was said, as to the necessity of proving the handwriting of the testator also. *Myers v. Taylor*, 1 Brev. 245, decided in 1803, held that in an action on a bond it was necessary to prove the handwriting of the

subscribing witnesses, in proof of the delivery of the bond, as well as that of the obligor. The report of the case does not show that any question was raised as to the necessity of proving the handwriting of the obligor, for that having been proved, the only question was whether it was not necessary to prove also the handwriting of the subscribing witnesses. In another report of this case, under the style of *Taylor v. Myers*, 2 Bay, 506, Judge BAY appends an "N. B.," in which he says that the judges in a subsequent case, the name of which he does not give, upon a reconsideration of the point, held that the rule had been laid down too strictly, and that proof of the handwriting of the obligor would be sufficient without proof of the handwriting of the subscribing witnesses. The case referred to is probably that of *Madden v. Burris*, 1 Brev. 387, decided in 1804, in which the court held that the indorsement on a note, to which there was a subscribing witness, was sufficiently proved by testimony that such indorsements were genuine without producing the subscribing witness to the indorsement, or proving his handwriting. The next is *Gervais v. Baird*, 2 id. 37, decided in 1806, in which the action was on a note signed with a + mark, to which there was a subscribing witness, who was not produced, nor was any proof of his handwriting offered, but another witness proved that the defendant was in the habit of making her mark in the same manner in which it was made on the note, and said that he believed the mark was hers. Held, that the proof was sufficient upon the authority of *Madden v. Burris*, *supra*.

It is true, that GRIMKE, J., in delivering the opinion of the court, did say: "Proving the handwriting of the subscribing witness would not be sufficient." This remark is, however, clearly nothing more than an *obiter dictum*, and not called for by any thing occurring in the case, as it does not appear that there was any offer or attempt to introduce such proof. *Paisley v. Snipes*, 2 Brev. 200, decided in 1807, was an action on a note purporting to have been signed by the defendant with a + mark, to which there was a subscribing witness, who, it was admitted, was a resident of the State. The court held that proof of the handwriting of such witness was not sufficient, upon the authority of *Gervais v. Baird*, in which, as we have just seen, the question did not arise. A better reason for the decision was however suggested, based upon the construction of the act of 1802, which seemed to require, in the absence of the subscribing witness, proof of the signature of the maker or ob-

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ligor, and therefore proof of the signature of the subscribing witness would not fulfill the requirements of the act. The court does go on to say: "If the maker of the note be a marksman, that circumstance will not avoid the necessity of proving his signature. In many instances the mark of a man who cannot write can be known and distinguished, and therefore the case admits of the same proof that is necessary in cases where the maker can write. But if the mark cannot be proved in this way, it must be proved by the subscribing witness to the note, or by some other person who was present and saw the mark made." These remarks were plainly not necessary to the decision of the question arising in that case, for as the subscribing witness was admitted to be a resident of the State, it was clearly insufficient to prove his handwriting. They may therefore be regarded as mere *dicta*; and this we are fully warranted in saying, for in the very next case upon this point, decided by the same court, in 1810 (*Shiver v. Johnston*, 2 Brev. 397) as we have seen above, the contrary was held, the court saying: "The signature of a marksman may be proved by the peculiarity of his mark (as in *Gervais v. Baird*, *supra*) or his acknowledgment, if the witness whose name is subscribed to the note does not attend; and proof of the handwriting of such witness is not sufficient, *if he be within the State* (as in *Paisley v. Snipes*, *supra*); but if the subscribing witness *be not within the State*, proof of his handwriting is sufficient, from the necessity of the case." This doctrine has been affirmed in the still later case of *Busby v. Whitaker*, decided in 1820. The next case is *Corneil v. Bickley*, 1 McC. 466, decided in 1821, of which there is no report, except that the point decided is stated to be that where the subscribing witnesses to a deed are out of the State, their handwriting must be proved, notwithstanding the fact that the handwriting of the grantor has been proved, and therefore throws no light upon the question under consideration, although it is sometimes cited to sustain the proposition that it is necessary to prove the handwriting of the obligor or grantor, as well as that of the subscribing witnesses. Next comes the case of *Plunket v. Bowman*, 2 id. 138, decided in 1822, which is much relied upon by the respondents, and serves as a basis for the case of *Russell v. Tunno*, which will be hereinafter considered. In *Plunket v. Bowman*, the action was on a bond. The subscribing witness being dead, his handwriting was proved, and the question was whether this was sufficient proof

of the execution of the bond. It was held that it was not, as the next best evidence, where the subscribing witness is inaccessible, is proof of the handwriting of the obligor, with the additional proof of the handwriting of the subscribing witness. It will at once be seen that the rule thus laid down is manifestly inconsistent with the terms of the act of 1802, and the decisions construing that act; as it is certainly well established now that proof of the signature of the obligor, except where the defendant denies such signature under oath, is sufficient proof of the execution of the bond, and that "the additional proof of the handwriting of the subscribing witness" is wholly unnecessary. Hence it is entirely true, as JOHNSTON, J., said, in the subsequent case of *Edgar ads. Brown*, 4 McC. 91, that the argument of the court (*Plunket v. Bowman*) proceeds entirely on the common-law rule, and the provisions of the act of 1802 are wholly overlooked. This however is not so important to the immediate point we have under consideration, and is only adverted to for the purpose of showing that the case was not so carefully considered as to give it that weight to which it would otherwise be entitled. What is more to the point is that in the decision of the court in this case, not a single one of the decisions in this State upon the subject is referred to. GANTT, J., who delivered the opinion, rests his decision entirely upon the doctrine "that the best evidence is to be produced which the nature of the case admits," and argues that you have not got the best evidence until you have proof of the signature of the obligor, and hence he deduces the rule that to prove the execution of any instrument to which there is a subscribing witness it is necessary to prove not only the signature of such witness, but also that of the maker. He admits that Phillips, in his Treatise on Evidence, and he might have said Starkie, also, lays down the rule differently, but he undertakes to show that the two cases upon which Phillips relies (*Prince v. Blackburn*, 2 East, 250; *Adams v. Kers*, 1 B. & P. 360) do not sustain his position. It is very true that the former case can hardly be regarded as authority for the rule laid down by Phillips, because, although the only evidence offered in that case was proof of the handwriting of the subscribing witness, yet as no question was raised as to the necessity of proving also the handwriting of the obligor, it cannot be considered as decisive of the point. But the case of *Adams v. Kers* is directly in point, and fully sustains the proposition laid down by Phillips and Starkie.

For in that case the question was distinctly made. The only proof offered was that of the handwriting of one of the subscribing witnesses, and it was insisted that it was necessary to prove also the handwriting of the obligor. BUTLER, J., held that it was not, saying: "In this case, one of the attesting witnesses was dead, and the other was beyond the reach of the process of the court; the best evidence, therefore, which could be obtained, was given. The handwriting of the obligor need not be proved; that of the attesting witness, when proved, is evidence of every thing on the face of the paper, which imports to be sealed by the party."

Judge GANTT, however, concludes his opinion by saying, that when it is impossible to prove the handwriting of the obligor and of the subscribing witness, "I will not say but that the one or the other may be dispensed with, provided it is manifest that nothing is kept back, and that the best evidence which the nature of the case admits of has been produced." So that even this case can scarcely be regarded as establishing, as an absolute rule, that the signature of the obligor must in all cases be proved. In *Sims v. De Graffenried*, 5 McC. 253, decided in 1827, the only point that seems to have been raised was whether proof of the handwriting of one of the subscribing witnesses to a deed, who was dead, was sufficient; the witness who proved this knowing nothing of the grantor or of the other subscribing witnesses, and it was held that it was not. It is also said: "The signature of the grantor and of the other subscribing witness, if he were dead or out of the State, should have been proved." The case is however so meagerly reported that it is impossible to say whether this is the language of the court or only that of the reporter, for the whole case seems to be nothing more than a mere abstract. But even if it were the language of the court, it cannot be regarded as authority, as to the necessity for proving the handwriting of the grantor, for the only question seems to have been whether proof of the handwriting of one of the subscribing witnesses was sufficient. The question does not seem to have been *what* proof would be sufficient, but whether the *proof* offered was sufficient. The case of *Trammell v. Roberts*, 1 McM. 305, decided in 1841, really decides nothing on the point under consideration. The sole question raised in that case was, whether it was necessary to examine the subscribing witness to a note, who was a resident of the State, when the defendant filed with his plea an affidavit that the signature to the note was not his, after

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it had appeared in evidence that the defendant had admitted that his name had, under his authority, been signed to the note by another, and it was held that as the affidavit filed took the case out of the provisions of the act of 1802, under the stringent rule of the common law, the subscribing witness must be produced, if within the reach of the process of the court. RICHARDSON, J., in delivering the opinion of the court, does use this language: "In such a case, and at common law, the subscribing witness must have testified in person, and in case he was beyond the jurisdiction of the court, then other witnesses, by proving his handwriting and the signatures of the makers of the note, would furnish legal, though secondary, evidence of the same facts," and for authority he refers to 1 Stark, 126-30. This however is nothing more than a *dictum*; and while it is sustained by the authorities cited, so far as the necessity for producing the subscribing witness, or proving his handwriting, if he is beyond the jurisdiction, is concerned, it is not only not sustained but directly contradicted by the author cited, so far as the necessity for proving the handwriting of the obligor is concerned. For, in 1 Stark. on Ev. 341, it is said: "It seems, however, to be now perfectly settled, for the reason already given, that evidence of the signature of one of the attesting witnesses alone is sufficient, as in the case of *Adams v. Kers*, where it was proved that one witness was dead, and that the other was in Jamaica, and proof of the handwriting of the deceased was held sufficient, without proof of the handwriting of the other witness or the obligor." The next case is that of *State v. Chancy*, 9 Rich. 438, decided in 1856, in which it was held that a bill of sale of personal property could not be received in evidence upon mere proof of the handwriting of the subscribing witness. But as there was no testimony as to whether such witness was or was not within reach of the process of the court, the case is of no authority upon the point in question. Then comes the case of *Russell v. Tunno*, 11 Rich. 303, decided in 1858, upon which the respondents in this case chiefly rely. In this case one of the questions was as to the execution of an assignment, purporting to have been executed in New Orleans, by Russell, in the presence of two witnesses, La Roque and Monaghan. To prove the assignment three witnesses were examined by commission in New Orleans, La Roque being one of them. He testified that he did not know any of the parties to the suit, one of whom,

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it will be observed, was the supposed assignor; that he remembered nothing whatever about the execution of the deed; signed his name as a witness; believed the signature of Monaghan to be genuine, as he was acquainted with his handwriting; did not know what was done with the deed of assignment; believed the notarial certificate attached to it to be in the handwriting of Monaghan, and the signature and seal thereto to be genuine; knew nothing whatever about Russell. The other two witnesses proved the signature of Monaghan, the notary, and that he had left New Orleans clandestinely and gone to parts unknown. Upon this testimony the Circuit judge allowed the question as to the execution of the assignment to go to the jury, and on appeal, the court held that "some evidence was necessary in addition to what was adduced on the Circuit to show the due execution of the assignment by Russell, as proof of his handwriting or something else, to connect him with the instrument before the paper could go to the jury." This decision was by a divided court—three to two—the sixth judge being absent. In delivering the opinion of the court, WITHERS, J., said: "This question, also, is attended by contrariety of decision, for there is not uniformity of opinion in English or American cases, perhaps, we may say, not even among our own. We have, however, a rule prescribed in *Plunket v. Bowman*, 2 McC. 138, which we think it proper to follow so far forth as this, that where a subscribing witness to an instrument is dead, or beyond the jurisdiction, something more than merely proof of his handwriting is required before the defendant shall be held connected with the paper as maker." He then proceeds to comment on *Edgar ada. Brown*, 4 McC. 91, in which it was held that proof of the signature of the obligor to a bond, executed in Delaware, without any proof as to the signature of the subscribing witnesses, who were not within the jurisdiction, was sufficient proof of the execution of the bond, saying that it was in conflict with *Myers v. Taylor*, 1 Brev. 245, but overlooks the fact that the last-named case had been overruled by *Madden v. Burris*, *supra*, and *Gervais v. Baird*, *supra*. He also cited *Paisley v. Snipes*, 2 Brev. 200, to show that proof of the signature of the maker was necessary, ignoring the important fact that in *Paisley v. Snipes*, the subscribing witness was admitted to be a resident of the State, and that precisely the contrary had been held in the subsequent case of *Shiver v. Johnson*, *supra*, where the subscribing witness was not a resident of the State. He

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also relies upon *Trammel v. Roberts*, 1 McM. 305, quoting the language of RICHARDSON, J., hereinbefore quoted, which, as we have seen, was not only a mere *dictum*, but unsustained by the authority cited to support it, so far as the necessity for proving the handwriting of the obligor, in addition to that of the subscribing witness, is concerned. The learned judge then proceeds to show that the testimony of the subscribing witness who was examined, instead of strengthening rather weakened the evidence of the execution of the assignment, for he knew nothing whatever of Russell, and nothing as to the delivery of the deed or what disposition was made of it. "He shook if he did not rebut such presumption as might have arisen from proof of his handwriting merely, where that might have been accepted." The English authorities relied upon in this case are *Parkins v. Hawkshaw*, 2 Stark. (N. P.) 239; 3 E. C. L. R. 332; *Nelson v. Whittall*, 1 B. & Ald. 19; *Whitlock v. Musgrove*, 1 Exch. 511. But in *Parkins v. Hawkshaw* the precise question which we are considering did not arise, as there was no attempt to prove the bond by proof of the handwriting of the subscribing witness. On the contrary, such witness was himself examined, and he testified that he saw the bond executed by a person who was introduced as Hawkshaw, and though he gave some description of his person he could not identify him with the defendant in the case. In *Nelson v. Whittall*, BAILEY, J., expressed his dissatisfaction with the rule laid down by Phillips, that proof of the handwriting of the attesting witness is sufficient, where such witness is beyond the jurisdiction, and thought that such testimony alone was not sufficient to connect the defendant with the note, but that something more should be required. In *Whitlock v. Musgrove*, which was an action on a note purporting to be signed by a marksman, it was held, that while it was not necessary to prove the signature of the maker, it was necessary, in the absence of such proof, to prove "something else to connect the party sued with the instrument." The authority of the cases, however, must certainly be regarded as very much shaken by the more recent cases of *Sewell v. Evans* and *Roden v. Ryde*, 4 A. & E. (N.S.) 626. See, especially, the remarks of Lord DENMAN, C. J., and PATTERSON, J., in the latter case.

The last case among the decisions in this State which we have been able to find upon this subject is that of *Jones v. Jones*, 12 Rich. 116, decided in 1859, in which it was held that where the

attesting witness to a note, signed with a + mark, was a free person of color, proof of his handwriting is not sufficient proof of the execution of the note, for the very obvious reason, as the court says, that "the witness could not have been called, not by reason of any intermediate disability supervening, but originally by reason of *status* : *a fortiori*, the proof of his handwriting merely was more objectionable." It is very true that the court, per WITHERS, J., does proceed to add these words: "But if he had been competent to attest and prove the deed, and had died, such evidence as was offered would be insufficient. Other evidence of the defendant's signature would have been necessary still," for which *Russell v. Tunno, supra*, is cited as authority. But these words were not only clearly unnecessary to the determination of the question raised in the case, but the authority cited does not go to the extent of holding that "other evidence of the defendant's signature would have been necessary still," in such a case, for it is conceded in *Russell v. Tunno* that in case of a paper purporting to be executed with a mark, proof of the handwriting of the subscribing witness would, under our decisions, be sufficient.

In New York the question seems to be settled, and there proof of the handwriting of the subscribing witness, when such witness is beyond the jurisdiction, seems to be sufficient without proof of the handwriting of the obligor or grantor. *Mott v. Doughly*, 1 Johns. Cas. 230; *Sluby v. Champlin*, 4 Johns. 461; *Kimball v. Davis*, 19 Wend. 437.

From this review of the cases it will be seen that it cannot be said that there is any well-established rule upon the subject, of universal or even general application; and while perhaps it would have been better to have adhered to the rule laid down by Phillips and Starkie as simple, definite and of easy application, well sustained, as it is, by high authority, we do not feel called upon to overrule the case of *Russell v. Tunno*, but are not willing to extend the rule there laid down beyond what that case imperatively demands. Conceding, however, the full force of that rule, we think that the testimony adduced in this case was amply sufficient to require that the question of the execution of the deed from Sarah Hane to Henry Lyons should have been submitted to the jury. For that rule does not require that the signature of the obligor or grantor shall be proved in addition to proof of the handwriting of the subscribing witnesses, but only that something more than mere

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proof of the handwriting of the subscribing witnesses is necessary; and in this case, as we have seen, there was something more than such proof. In addition to this it is conceded, as we have just said, in *Russell v. Tunno*, that in case of paper purporting to be signed with a + mark the rule is different under our decisions.

The judgment of the Circuit Court is set aside and a new trial ordered.

New trial granted.

WILLARD, C. J., and HASKELL, A. J., concurred.

CENTRAL NATIONAL BANK V. ADAMS.

(11 S. C. 432.)

Negotiable instrument—notice of protest—regularity of mailing—due diligence.

A notary, having no precise knowledge of an indorser's residence, but being informed that she resided at A., mailed notice of protest to her at that place in care of the maker. She resided midway between A. and G., but had got her letters at G. There was no post-office at A., but it was the duty of the postal agents in such cases to deliver letters at the nearest post-office, which was G. *Held*, that the notice was regular, although it never reached the indorser, and although she had changed her residence before the mailing.

ACTION on a note. The opinion states the facts. The plaintiff had judgment below.

W. H. Wigg and J. D. Pope, for appellant. 2. How can notice be effected? (1.) By mail, addressed to the party at his proper post-office. (2.) By personal service only, if the party resides in the town or city, at his residence or place of business. (3.) By special messenger, if there be no post-office communication, and the party does not reside in the town or city.

If sent by special messenger and a delay longer than by regular mail ensues, this will discharge the indorser. Story on Bills, *295; Byles on Bills, *220. Where notice is to be sent by general post, it should be in writing and properly directed, or it may be fatal. Story on Bills, 300.

3. Has notice been given to Amy G. Adams?

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If it is contended that notice was sent by mail, we answer : (1.) That it was not addressed to Amy G. Adams. (2.) That it was not sent to her regular post-office — Grovewood. (3.) That it was addressed to no post-office at all, "Adams Cut" being no post-office. 1 Pet. 580; 1 Am. Lead. Cas. 396, and note, 400; 2 Rich. 339. It must be duly directed to post-office of indorser and directed to him. Story on Bills, 227-382.

The notice here is fatally defective. The bank — (1.) Employed the mail, but directed the letter to no known post-office. This is fatal. (2.) The bank does not direct the notice to Mrs. Adams, at her post-office, but to the *care of James P. Adams*, not at *his* post-office even, but to a place that is not a post-office at all. This is fatal. (3.) The bank uses the mail, but addresses the letter to James Adams, at a place that is not a post-office, and then employs him as the messenger to *pick up the letter somewhere*, and asks the messenger to deliver the notice to Mrs. Adams. (4.) The evidence shows that Mr. James P. Adams, the bank's messenger, never received the letter. But is it diligence to direct a notice to the indorser and to use as its messenger the very person *whose interest it was to destroy the letter and not deliver the notice?*

The fatal error on the part of the notary is in addressing to a place, within a few miles, which place was not a post-office. Inquiry at the public post-office would have given the information; to fail to do so was negligence.

F. W. McMaster, contra.

McIVER, A. J. This was an action against the defendant as indorser of a negotiable note, and the sole question raised by the appeal is whether the plaintiff used due diligence in giving notice of the dishonor of the note. The facts are undisputed, and are as follows: On the 25th of September, 1875, James P. Adams executed his note payable to Amy G. Adams, who, as an accommodation, indorsed the same to the plaintiff. The note not being paid at maturity, it was protested, and notice of non-payment was, in due time, sent by mail, postage prepaid, in a letter addressed to "Amy G. Adams, care of James P. Adams, Adams' Cut." There was no such post-office as Adams' Cut, but the instructions to mail agents, in case a letter is directed to a place where there is no post-office, are to leave it at the nearest post-office, and Gadsden is the

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nearest post-office to Adams' Cut, on the South Carolina railroad. The appellant lives equi-distant between Gadsden and Adams' Cut, and letters for her frequently came to Gadsden, which were taken out by her friends and servants. The letter containing the notice in question was never received, either by Mrs. Adams or James P. Adams. The regular post-office of appellant, "until the last two years," was Gadsden, since which time Grovewood has been her post-office. Owing to the want of date as to when the testimony was taken, it is impossible to say when these "last two years" commenced to run, and as the case does not show the date of the trial, we have no means of determining when it was that appellant's post-office was changed from Gadsden to Grovewood, or whether such change had been made before or after the maturity of the note. All that we know is, that the note became payable on the 5th of October, 1875, and the original hearing before Judge TOWNSEND, when the testimony was taken, was some time in the latter part of the year 1877. The appellant lives about a mile and a half from Grovewood and four miles from Gadsden. James P. Adams testified that he never took out Mrs. Adams' letters; that Grovewood was his post-office, but he occasionally got letters directed to him at Gadsden and Hopkins, and that he had received private letters dropped at Adams' Cut, but not through the mails. The notary who sent the notice to Mrs. Adams got his information as to Mrs. Adams' post-office from Walter Fisher, who frequently hunted in that neighborhood; was well acquainted with the residence of the defendant, and was the person from whom the notary always got his information when he wanted to send notices of protest into that neighborhood. When the facts are undisputed the question of diligence is a question of law. *Bank of Columbia v. Lawrence*, 1 Pet. 578; *Thompson v. Bank*, 3 Hill, 82; *Bateman v. Joseph*, 12 East, 433. And while it is unquestionably the duty of the holder to give notice to the indorser of the dishonor of a note, except in certain cases, not necessary to be mentioned here, he is only bound to use due diligence in communicating the notice, and is not required to see that such notice actually reached the party for whom it is intended. If he employ the usual and ordinary mode of conveyance, he has done all that the law requires of him. *Bank of Columbia v. Lawrence*, *supra*. The usual and ordinary mode of conveyance by which such notices may be transmitted, where the parties reside in different places, though in

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the same county, is the mail. *Foster v. Sineath*, 2 Rich. 338. And the usage of the officers employed in the various details of the operations of the post-office department, as prescribed by law and the rules and regulations of the department, are proper and important to be considered in determining a question of diligence. *Dickens v. Beal*, 10 Pet. 572.

Now in this case there is no doubt but that the notice to appellant was mailed in due time, there being no question raised as to that, and the only question is as to whether it was properly directed. It was not directed to any legal post-office, but by the regulations of the post-office department, it was the duty of the mail agent to leave the letter at the nearest post-office, which was Gadsden, so that the question may be considered as if the letter had been directed to Gadsden, which certainly had been the post-office of appellant, and for aught that appears to the contrary in the "case," was still her post-office at the time the notice was sent, though not her post-office at the time of the trial or at the time her testimony was taken. But we are not disposed to rest our decision upon this, and will assume that Mrs. Adams had changed her post-office before the notice was sent. Even upon this assumption we still think that due diligence was used. For there is no evidence whatever to show that plaintiff knew or had any reason to suppose that she had changed her post-office; and the testimony shows that the letter containing the notice was directed in conformity with information obtained from a person who was likely to know her address. The rule is, that where the holder is ignorant of the address of the indorser, he is only bound to use due diligence by inquiring of persons likely to know to ascertain such address, and if, after using such diligence, the information which he receives, and upon which he acts, proves to be incorrect, it will be sufficient. *Harris v. Robinson*, 4 How. 336; *Lambert v. Griselin*, 9 id., 552; *Chapman v. Lipscomb*, 1 Johns. 294. As is said in *Harris v. Robinson*, "It is enough to send the notices to the place where the information received reasonably requires him to send them. If the place it reaches is the wrong one, he is not then in fault." Whether due diligence has been used in making such inquiries is a question of fact. *Bateman v. Joseph*, 12 East, 433; *Thompson v. Bank*, 3 Hill, 82-3. And that question has been determined against the appellant, both by the referee and the Circuit judge.

In addition to this, the testimony shows that Mrs. Adams con-

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inued to receive letters from the post-office at Gadsden; and where persons are in the habit of receiving letters addressed to them at two or more post-offices, a notice addressed to either of such offices will be sufficient. It is not necessary, in such case, that it should be addressed to the office nearest to the residence of the party for whom the notice is intended. *Bank v. Carneal*, 2 Pet. 551. In *Saco National Bank v. Sanborn*, 63 Me. 340; s. c., 18 Am. Rep. 224, the indorser had lived for many years in the town of Baldwin, but at the time the note upon which the suit was brought became payable, he lived in the adjoining town of Denmark. The notice was directed to "Baldwin," but there was no post-office of that name, there being three post-offices in the town known by the names of "North Baldwin," "East Baldwin," and "West Baldwin." The notice was sent upon information received from persons most likely to know. It also appeared that at the time of the maturity of the note, there were two directions in common use in Saco which gave the defendant's residence as Denmark. *Held*, that due diligence had been used. The court uses this language, which, we think, is a correct statement of the rule: "Proof that a letter containing the proper information, seasonably put into the post-office, directed to the indorser at the place where, after diligent inquiry, he was supposed to reside, will sustain the averment of notice, although, as matter of fact, the indorser did not reside there and the letter never reached him." And again the court says: "If the indorser changes his residence and does not give the holder notice of such change, and he does not in fact know it, and is not guilty of negligence in not knowing it, notice sent to his former residence is sufficient. And when nothing has occurred to suggest the idea of a change, no inquiry is necessary." These remarks apply with increased force to a change of post-office, which of course is not likely to be so notorious as a change of residence. If, therefore, as we have seen, by reason of the post-office regulations, the notice in this case, though in fact directed to Adams' Cut, was practically sent to Gadsden, the nearest post-office, which, to say the least of it, had been the post-office of defendant up to about the time the notice was sent, the notice was unquestionably sufficient, as there is no evidence whatever that the plaintiff knew or had any reason to suppose that her post-office had been changed.

It is argued, however, that the manner in which the letter con-

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taining the notice was directed, Mrs. Amy G. Adams, *care of James P. Adams*, was objectionable. We are unable to perceive the force of this argument. The usual object of that mode of address is to expedite the delivery of the letter, and so far from its being any evidence of negligence it would seem to point to a contrary conclusion. If the letter had been directed to *James P. Adams*, with a request that he would forward the notice inclosed to the defendant, there might be some force in the argument used at the hearing, that the plaintiff had employed Mr. Adams as a messenger to deliver the notice to Mrs. Adams. But such was not the case. The letter was directed to *Mrs. Adams*, and would have been delivered to her if she had called in person at the post-office or sent an agent or servant for her mail, whereas, if it had been directed to Mr. Adams, it could only have been properly delivered to him or his order. By the mode of address which was adopted her chances of receiving it promptly were increased rather than diminished, as doubtless was the purpose in using that mode. Nor are we able to perceive the force of the argument that it was any thing but diligence to direct a letter containing a notice to the indorser of the non-payment of a note to the maker of such note — “the very person whose interest it was to destroy the letter and not deliver the notice.” For this argument rests upon two assumptions, neither of which is well founded: 1. That the letter was directed to the maker of the note. 2. That a person who receives a letter directed to another in his care is at liberty to open such letter and acquaint himself with the contents.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

WILLARD, C. J., and HASKELL, A. J., concurred.

MCDUFFIE V. MCINTYRE.

(11 S. C. 551.)

Guardian and ward — sale of ward's bond and mortgage — when not warranted

A guardian sold his ward's bond and mortgage, the purchaser paying in part by applying a debt past due to him from the guardian personally. The guardian became insolvent and failed to account, and his bond became worthless. There was no evidence of the proper application of the purchase-money. The purchaser knew of the trust. *Held*, that the purchaser got no legal title, and equity would not uphold the transfer under such circumstances.

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SUIT for foreclosure. The opinion states the facts. The plaintiff had judgment below.

W. J. Kerall, A. L. Evans and C. A. Woods, for appellants.

W. W. Sellers, for respondent.

HASKELL, A. J. The facts of the case are simple. Real estate belonging to infants was sold under an order of the court, and a bond and mortgage taken by the commissioner in equity to secure the payment of so much of the purchase-money. A guardian was subsequently appointed, and the commissioner turning over to him, under an order of the court, the proceeds of the said sale, assigned to him the said bond and mortgage. The guardian sold and assigned the bond and mortgage, on which there was a balance still unpaid, to the plaintiff in this action. The purchaser paid the larger portion in money, but to the extent of about \$700 he paid by a debt due to himself by the guardian personally. He (the purchaser) has now brought an action to foreclose the mortgage, and the question has arisen whether he or the infants are the legal owners of the bond and mortgage. The infants claim that they are legally entitled. The foreclosure has been had, and the money is now in the hands of the court, awaiting decision upon the point. The guardian has entirely failed to account, and is now insolvent, as are his sureties also. The Circuit judge has decided, first, that the guardian had the legal right to sell the bond and mortgage as if it had been his own; and secondly, that even if he had not the legal right, the sale would have been made by the court under the circumstances, and should now be confirmed.

The first conclusion of law is regarded by this court as entirely erroneous, and the second as based upon a presumption of facts which the evidence in no wise sustains. The cases of *Bailey v. Patterson*, 3 Rich. Eq. 156, and *Moore v. Hood*, 9 id. 311, are conclusive on the point that a guardian has no legal title to the personal property of his ward, and that a sale by him is voidable, at the option of the infant, when he comes of age. In the former the purchaser was made to deliver up the property, while in the latter case the court said: "It is not intended to be intimated that the purchaser in this case could not have been successfully pursued if he and the slaves had been found within the jurisdiction." Page 327. The appellants only ask against the purchaser the pro-

ceeds of the judgment of foreclosure. They are entitled to that relief. The bond and mortgage have been held by the purchaser in trust for them, and must now be turned over to them as the legal owners. The remedy for the purchaser, if he has any, is against the guardian. This case is stronger, if any thing, than that of *Moore v. Hood*, where the sale was made under an order of a court, but in a proceeding to which the ward was not a party. The Circuit judge, however, seems to rely on the case of *Long v. Cason*, 4 Rich. Eq. 60, and claims that the decision in that case "draws a distinction between the sale of a chattel, such as a slave, and the collection of a debt, or the sale and assignment of a bond and mortgage and chose of the ward, and seems to recognize the legal power of a guardian to sell and transfer a bond and mortgage belonging to an infant." We can find nothing in the case or elsewhere to justify such an inference, but on the contrary, the whole tendency of the discussion in that case is the other way. What the case really does decide is thus plainly stated by the court in its concluding words: "It is not necessary, in this case, to determine what may be the operation of the statute [of limitation] against an infant with guardian as to legal demands standing in the name of the infant. Our judgment is limited to the case presented. We hold that as to a chose of the infant not assignable at law, and peculiarly within the power and duty of the guardian, the laches of the guardian, in the absence of collusion, by operation of the statute of limitations, bars the infant as to strangers, and leaves him to his remedy against the guardian." The court does discuss what is "within the power and duty of the guardian," and in so doing distinctly recognizes the authority of *Bailey v. Patterson*, and disavows any recognition of the doctrine intimated in *Field v. Schieffelin*, 7 Johns. Ch. 150, and held in *Bank of Virginia v. Craig*, 6 Leigh, 399, "that guardians have the same title to the personal estate of their wards as executors have to the personal assets of their testators." The decision of *Long v. Cason* was concurred in by the chancellor, whose decree was adopted by the court in *Bailey v. Patterson*, and although another chancellor (Dargan) dissented, it was upon grounds totally different.

Examination of both opinions will show that the whole court assented to the proposition of law that "the guardian is not possessed of any legal estate in his ward's chattels or choses." This fact in law is the very difficulty which the dissenting chancellor

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cannot surmount; for to his mind, the statute could only run against the guardian if the legal title was in him; while to a majority of the court it appeared that the possession of the right of action, with the power to receive and acquit, was sufficient. That such is the meaning is put beyond doubt by remarks in *Moore v. Hood*, by Chancellor WARDLAW, who delivered the opinion in both cases. In discussing "the rule requiring beneficiaries to be parties, * * * although the trustees have the legal title," and *a fortiori*, where they have not the legal title, as in the case of guardians, he says: "It was adjudged in *Bailey v. Patterson*, 3 Rich. Eq. 156, and recognized in *Long v. Cason*, 4 id. 60, that a guardian has not the legal title of his ward's chattels, and that his sale of them is voidable at the option of the ward. Long ago it was decided, in *Inwood v. Twyne*, Amb. 419; 2 Eden, 148, that a guardian could not change the character of his ward's estate without the authority or sanction of the court, and this doctrine was recognized in *Capehart v. Huey*, 1 Hill's Ch. 409." The authorities upon the point are conclusive, and the judgment of the Circuit Court that the guardian had the right and the legal power to sell the bond and mortgage in question must be reversed.

But the Circuit judge goes further, and comes to the same conclusion, in the results at least, upon the additional ground that such sale was a mere "change of the nature of the infant's estate," which would have been directed by the court under the circumstances, and which the court should afterward confirm. The doctrine upon that subject is thus well expressed in *Long v. Cason*: "In general, guardians cannot change the nature of infant's estates, but they may even do that, as is said by Lord HARDWICKE in *Inwood v. Twyne*, Amb. 419; 2 Eden, 148, under particular circumstances, and the court will support their conduct if the court would do it under the same circumstances. They are entitled, however, to the possession and management of all the property of their wards, and to the collection and disbursement of all the income, profits, and credits arising therefrom. Their authority extends to bind the infants by all such acts as appear to be for the advantage of the infants, and for which the guardians are liable to account. I apprehend that a guardian has plenary right to receive moneys coming to his ward, and to prosecute, compound and acquit any debt or liability to the ward. He always acts under responsibility to his ward for the faithful and judicious performance of his trust,

and is liable for any fraud, gross negligence or other breach of trust. But a stranger dealing with him as to the choses of the ward may rightfully presume that he is acting for the benefit of the infant, and in the absence of any evidence of collusion, does not partake of the guardian's responsibility." What is meant by "possession and management of all the property of their wards" is thus defined and limited in *Moore v. Hood, supra*: "Management of an estate implies its administration in its existing state, but the order here affected the *corpus* of the estate and changed its nature." It will be seen that such was the effect of the "management" in the present case. The Circuit judge relies on the opening and concluding sentences of the portion above quoted, and omits to take any notice of the intervening expressions. The remarks with regard to strangers dealing with guardians are in no sense connected with the sentence of Lord HARDWICKE. That part refers to transactions which are in their nature voidable at the option of the ward, but confirmable by the court, if, under the circumstances, they seemed really wise and proper, though the guardian had not the legal power; while the latter portion, in speaking of strangers dealing with guardians, relates only to those transactions which flow out of the exercise of the properly legal powers of guardians, for which, while the guardians are responsible, strangers are not liable where there was no collusion. For instance, if the mortgagor had satisfied the bond and mortgage by paying the money to the guardian, and the guardian wasted the money, the mortgagor would not be liable because of the waste. But if, on the other hand, the payment had been made by means of a debt due by the guardian personally to the mortgagor, or the money had been paid with the understanding that it would be loaned back to the mortgagor without security, or for other purposes of misapplication, there would be fraud or collusion on the part of the stranger, and he would be liable. That a stranger is not protected, either at law or in equity, in the purchase of property to which the vendor has neither legal title nor power of sale, is too obviously a general proposition to need authority, and that is just the case where a guardian sells the property of his ward without authority from the court. The only grounds upon which such sale can be confirmed are those which would have induced the court at the time to order the act to be done, together with the other, that it has turned out to the advantage of the ward. The evidence pro-

duced in the case will not permit such a conclusion. The sale of the bond and mortgage was for money, in part, and in part a debt owed by the guardian personally to the purchaser. It cannot for a moment be said that the court would have ordered such a proceeding. The change of the nature of the estate was practically from a bond secured by real estate into a loan to the trustee without any security. It was in law a fraud on the part of the trustee, and the mode of payment was notice to the purchaser, for it was *per se* a misappropriation of the ward's money, and gave him full warning that he was proceeding entirely at his own risk, relying upon the guardian and his sureties to account to the ward. The evidence is conclusive that the character in which the guardian held the bond and mortgage was known to the purchaser, for it was upon the instruments themselves. The part payment by debt past due, and owed by another than the guardian as guardian, was in itself a misapplication, and the circumstantial evidence that the whole amount was to be put by the guardian to his own use, and that the purchaser ought to have suspected it (if he did not know it) is very strong. Such being the case, the burden of proof is entirely upon the purchaser. Neither he nor the guardian have produced a tittle of proof that the whole amount was not misapplied, nor any thing to justify such use of the property of the ward. It was, in substance, a loan without security to a party against whom there were at the time judgments to large amounts unsatisfied, and his circumstances at best embarrassing. And as has been so well said in *Spear v. Spear*, 9 Rich. Eq. 184, by way of comment upon the case of *Sweet v. Sweet*, Speer's Eq. 309, the guardian's bond is not to be regarded as the security required by law for investments of money belonging to the estate. "It is proper," says the court, "for the security of his [the guardian's] beneficiaries and his own sureties, and for the avoidance of litigation of a particularly disturbing character, that the trust estate should be secured doubly: first, by stock or bonds, in which it may be invested, and then by his own bonds." Thus, a trustee who gives his bond for the faithful performance of his duties, is bound to treat the trust funds exactly as a trustee who has not given such a bond, to act with the same diligence and to obtain the same security on his investments. The conclusion of the court is, therefore, that the sale was without authority of law; that the evidence shows no grounds which would justify the court in confirming the sale; that

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on the contrary, the circumstances are such as would have rendered the purchaser liable (*Rhame v. Lewis*, 13 Rich. Eq. 269) if the legal title in the vendor had been proved, and only the breach of trust with collusion on the part of the purchaser had been the question; that therefore the sale is void as against the wards, and they are legally entitled to the benefit of the proceedings in foreclosure to which they have been made parties.

The case is remanded, that such proceedings as may be necessary may be had, in conformity with the views herein expressed.

Motion granted.

WILLARD, C. J. and McIVER, A. J., concurred.

GRANT V. GRANT.

(12 S. C. 20.)

Statute — repeal of divorce laws — effect on pending action.

A statute repealing all divorce laws of the State ousts the court of jurisdiction in an action for divorce pending at the passage of the statute.

ACTION for absolute divorce, commenced December 12, 1878. On the 20th of December, 1878, a statute went into effect repealing all divorce laws of the State. The parties were married in 1869. The defendant did not appear. The action was dismissed below. The opinion states other facts.

D. A. Straker, for appellant.

WILLARD, C. J. This action was for a divorce *a vinculo*, on the ground of adultery. The complaint was dismissed on the ground that no such remedy existed by the laws of this State. The Constitution (art. IV, § 15) declares "that the Courts of Common Pleas shall have exclusive jurisdiction in all cases of divorce." By the act of 1872 (15 Stat. 30) a divorce from the bonds of matrimony was allowed on the ground of adultery, but that act was repealed by the act of 1878. 46 Stat. 719. It is contended, however, that the statute of 1878 is void, as tending to impair the obligation of the marriage contract alleged in the complaint, and also that the remedy in question is completely granted by the constitutional provision already recited. The marriage was solemnized in 1869, prior to the statute which has been thus repealed, and by such repeal the law now stands in the same position in which it stood at

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the time of the contracting of the marriage, so that if the general proposition advanced as to the effect of the constitutional inhibition of laws tending to impair the obligation of contracts was sound, still it would be inapplicable to the present case. The general proposition cannot, however, be maintained, as the Constitution has regard to questions of property and not of matrimonial status. As this proposition is inapplicable it need not be developed in the present case. As it regards the second proposition, namely, that the remedy exists in an available form under the Constitution apart from all legislation on the subject, it must be borne in mind that prior to the adoption of the Constitution no such remedy existed in this State. *Mattison v. Mattison*, 1 Strobb. Eq. 387. It was argued that the inference from the authorities is that the defect was one of jurisdiction alone and not of legal right, notwithstanding the fact that no court had been rendered competent to entertain such a remedy; that as the abstract right to have such a remedy existed by law, such remedy could be had at the moment such a jurisdiction was called into existence, and that such competency was created in the Court of Common Pleas by the Constitution. It is clear that *Mattison v. Mattison* will not bear the construction thus sought to be put upon it, but must be regarded as determining that such a remedy was excluded by the policy of the law. It was held by this court in *State v. County Treasurer*, 4 S. C. 524, that a mere grant of judicial power in the Constitution did not remove from the legislature authority to determine to what class of cases such judicial power should extend. *State v. Gaillard*, 11 S. C. 309. No remedy is complete without a definition of the cases to which it shall extend, and the Constitution is wholly silent on this subject. There is therefore nothing in the Constitution tending to deprive the legislature of full power of granting or withholding such remedy which the legislature primarily possesses. The act of 1872 was an exercise of this power, and its repeal in 1878 an equally effective exercise of the power of withholding such remedy. But article XIV, section 5, of the Constitution sets this question at rest. That section provides "that divorces shall not be allowed but by the judgment of a court, as shall be prescribed by law." In the absence of a law authorizing such a judgment none can be pronounced having the effect allowed by this section.

The appeal must be dismissed.

Appeal dismissed.

MOLVER and HASKELL, A. JJ., concurred.

STATE V. PITTS.

(12 S. C. 180.)

Criminal law — larceny — paraphernalia.

While a married woman may acquire title to articles of apparel by gift from her husband, yet her mere use and enjoyment of such articles purchased by her husband does not give her title thereto as her separate property; and on an indictment for stealing such articles, laying them as the property of the husband, the question of title is for the jury. (*See note, p. 510.*)

CONVICTION of grand larceny. The opinion states the case.

Pope & Watts, for appellant.

B. W. Ball, contra.

WILLARD, C. J. [Omitting minor points.] The indictment was for larceny of clothing, and the property therein was laid in John T. Duncan. The evidence tended to prove that part of the property alleged to have been stolen consisted of clothing of a deceased wife of Duncan, who died in 1855, and the residue the clothing of his present wife.

It does not appear when Duncan was married to his present wife. The larceny was alleged to have occurred July 21st, 1878. The requests to charge, as stated in the agreed statement of counsel, contains three propositions. The first proposition is, "that prior to the adoption of the Constitution of 1868 the paraphernalia of a married woman consisted of clothing and jewels, and in this she had a separate estate." This proposition is immaterial, and no regard need be paid to the question whether it is strictly accurate.

There is no doubt that before the adoption of the present Constitution a conviction could be had upon an indictment for larceny, alleging the property in the goods to be in the husband, when the goods were the clothing of the wife. The question of the nature and extent of the wife's paraphernalia had no bearing on that question.

The second proposition is, "that since the adoption of the present Constitution a married woman has a separate estate in her

clothing and all other property, and the marital rights of her husband cannot attach." This proposition is inaccurate.

It is true that under the Constitution she *may have* a separate estate in her clothing and all other property, and the marital rights of her husband cannot attach to such separate estate; but the question whether in point of fact she has such separate estate depends on whether such property was acquired in the manner prescribed by the Constitution as the means requisite to create in her such separate estate.

Article XIV of the Constitution, section 8, provides that "the real and personal property of a woman, held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be held as her separate property, and may be bequeathed, devised or alienated by her the same as if she were unmarried; provided that no gift or grant from the husband to the wife shall be detrimental to the just claims of his creditors." It is clear that a wife can acquire, as her separate estate, real and personal property by gift or grant from her husband, for in the first place, her power to acquire is in terms unlimited as to the person from whom she may so acquire, and in the second place the proviso necessarily implies that such acquisition may be directly from her husband. It must therefore appear, either by proof or a proper presumption, that either expressly or by implication such an act of acquisition has occurred. Such an act implies the transfer to the wife of real or personal property, with the intention that title thereto should pass to and vest in her, in order that the character of a separate estate should be imposed upon it as intended by the Constitution.

The second proposition is defective in assuming, as matter of law, that the mere fact that a wife is in the use and enjoyment of clothing or other personal property is sufficient to establish her right to a separate estate therein.

The third proposition is to the effect that "if the jury believed the clothes were the property of Mrs. John T. Duncan, the prisoner should be found not guilty." This proposition was improperly refused. The fact that Mr. and Mrs. Duncan bore toward each other the relation of husband and wife may have been calculated to raise a presumption that he had such a possession of the articles alleged to have been stolen as to warrant the allegation made in the

indictment, yet that would give rise to a question of fact which the judge could not decide.

It was for the jury to determine what was the fact, under proper instructions, as to the rule of presumption in such cases.

There was, therefore, error in the refusal to charge the third proposition embraced in the requests to charge in behalf of the prisoner.

As there should be a new trial it is unimportant to examine the effect of a discrepancy between the terms of the sentence pronounced in open court and that recorded.

There should be a new trial.

New trial granted.

McIVER and HASKELL, A. JJ., concurred.

NOTE BY THE REPORTER.—In *Pratt v. State*, 35 Ohio St. 514, it was held that necessary and suitable clothing furnished by a husband to his wife, or purchased by her with money or means given to her by her husband for that purpose, does not become her separate property within the meaning of the statute concerning the rights and liabilities of married women. The court said: "Notwithstanding the very comprehensive terms of this statute, a majority of the court are of the opinion that they do not embrace the wearing apparel of his wife, furnished by the husband, or purchased by her with money or means given to her by the husband for that purpose. As to such property, it was not intended by the statute to deprive the husband of all ownership and control; for surely, while the duty of the husband to furnish his wife with necessary and suitable clothing is continued, it was not intended to deprive him of the right to control and preserve it. Nor does it make any difference, where a wife purchases her apparel with pin money, given to her by her husband to be expended according to her will and pleasure. Of such property, the possession of the wife is the possession of the husband. It has been held, however, by the Supreme Court of Indiana, that a statute similar to ours operates as to clothing of the wife acquired otherwise than from the husband, or through his means, so as to invest her with a separate estate therein. *Stevens v. State*, 44 Ind. 460. See, also, 17 Ala. 415; *Haskins v. Providence & Worcester Railroad Co.*, 119 Mass. 506; s. c., 20 Am. Rep. 353; 51 Ill. 102; 1 Am. L. Reg. 434. And we are inclined to think that there are good grounds for the distinction. Where the wife's clothing is furnished by the husband, in discharge of his marital duty toward her, the statute does not divest him of the property contrary to his intentions; while on the other hand, where the property is otherwise acquired by the wife, the statute simply prevents a title vesting in him by virtue of his marital relation. Under the statute, the 'gift,' which is declared to be the separate property of the wife, is a voluntary one, as all gifts must be, and does not embrace necessities which a husband is under a legal duty to furnish his wife." Under the New York statute a married woman can sue in her own name for injury to her paraphernalia; *Rauzon v. Penn. Railroad Co.*, 48 N. Y. 212; s. c., 8 Am. Rep. 543; but in the absence of proof of a gift to her, the husband can sue. *Curtis v. Delaware, etc., Railroad Co.*, 74 N. Y., 116; s. c., 30 Am. Rep. 271.

CRIBB V. ROGERS.

(12 S. C. 564.)

Deed — reservation to use of grantor — estate.

A deed of land to A., her heirs and assigns forever, in consideration of love, good-will and affection, reserving the use of the lands during the grantor's natural life, conveys the fee *in presenti*, subject to the life estate.

ACTION to recover land. The opinion states the case. The defendant had judgment below.

Harlee & Montgomery, for appellants, cited *Dinkins v. Samuel*, 10 Rich. 66; *Singleton v. Bremar*, 4 McC. 14; 4 Kent's Com. 5; 2 Bl. Com. 104; Wms. on Real Prop. 55, 155-6; Gen. Stat. 427, § 8.

J. G. Blue, for respondent.

WILLARD, C. J. The plaintiffs claim as heirs at law of D. Cribb, and the defendants under the following deed of lands: "I, Dempsey Cribb, of the county and State aforesaid, for and in consideration of the love, good-will and natural affection which I have and bear to Margaret Lewis, have given, granted and conveyed, and by these presents do give, grant, release, convey and deliver to the said Margaret Lewis, a certain tract, piece or parcel of land, containing four hundred and sixty-seven acres, more or less, reserving for myself the use of said lands during my natural life only, said lands being situated," etc. Then follows the description of the lands conveyed "to the said Margaret Lewis, her heirs and assigns forever." The deed concludes with a general covenant of warranty, and was duly executed and attested.

The only question affecting the validity and operation of the deed, as sufficient to pass a fee in the lands conveyed, arises out of the words "reserving for myself the use of said lands during my natural life only." The fact that the usufruct is separated from the fee is not inconsistent with the vesting of the fee. The grantor may convey the fee to one and the usufruct to another; hence the reservation of the usufruct to himself violates no rule governing the vesting of the fee. The grantee takes the fee, burdened with a use in favor of the grantor for his natural life.

It has been argued that under the operation of the statute of uses the fee was, at the moment of its creation, thrown upon the grantor by the execution of its uses, and thus the deed rendered ineffectual. The statute of uses could not operate *until* there was such a title in the grantee, as the deed was intended to vest, and this was a fee. The only effect of the statute would, assuming its operation, be to cast upon the grantor an estate commensurate with the uses created by the deed, and that would be a life estate, leaving a remainder in fee vested in the grantee, which would owe its existence as such, not to the deed, but to the operation of the statute. The rules of the common law, as it regards the support, required for a remainder, are therefore inapplicable, for the deed does not create a remainder as such. The statute cannot operate to defeat the deed, for it was not intended to have such effect, but only to effectuate its purposes by raising estates competent to give the fullest support to its uses.

Jenkins v. Jenkins, 1 Mills' Ch. 48. That case fully sustains the conclusions just stated. The same conclusions were reached in *Sunday v. Boon* (MS.), cited in *Jagers v. Estes*, 2 Strobb. Eq. 376.

Singleton v. Bremar, 4 McC. 15. The present interest was conveyed by the deed in that case, as it was to take effect only upon the death of the grantor. It is contrary to the nature of a deed that it should commence to operate as such at a time subsequent to its delivery; on the contrary, it must take effect, if at all, from the moment of delivery to operate as a deed, though in certain cases it may be upheld as a covenant to stand seized to the use of the grantee.

Dinkins v. Samuel, 10 Rich. 66. The principal question actually passed upon by the court was, whether such a relationship subsisted between the parties to the deed as could support the deed as a covenant to stand seized upon the consideration of *natural love and affection*. The conclusion that the deed in that case could not operate as a conveyance of a present interest probably arose from the terms of the *habendum* clause, and appears to have been reached without any particular consideration of the terms of the deed. As no reference is made to *Jenkins v. Jenkins*, it is fair to conclude that the view presented by this case was not pressed upon the court. Certainly no intention to overrule that case can be assumed, as it is not expressed, and it may reasonably be assumed that some attempt would have been made to distinguish that case from *Jenkins*

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v. *Jenkins* if the question in all its bearings was in the mind of the court. Judge WITHERS should then be understood, when, speaking of the absence of a substantial valuable consideration, he says : " It is, therefore, not a deed of bargain and sale ; it is not a conveyance by lease and release, nor a deed of feoffment. The only question is, whether it can operate by way of covenant to stand seized to uses," as intending only that there was no such valuable consideration as would be competent to raise a use that would support the deed as a covenant to stand seized, where it was, for other reasons, confessedly inoperative as a deed. It is enough to show the correctness of this interpretation that the deed in that case did express a nominal pecuniary consideration, in addition to *natural love and affection*, showing that he was solely considering the operation of the deed as a covenant to stand seized.

It appears, then, that a present interest passed under the deed, and it becomes unnecessary to consider the other questions discussed, as they relate to the proofs to which resort may be had to support the deed as a covenant to stand seized. Misdirections as to such immaterial issue could not have affected the verdict of the jury who sustained the defendant's title.

The appeal should be dismissed and the judgment affirmed.

Appeal dismissed.

MOLVER, A. J., concurred.

STATE V. SAMPSON.

(12 S. C. 567.)

Criminal law — burglary — mill.

At common law a mill, in which no one sleeps, seventy-five yards from the owner's dwelling-house, separated therefrom by a public road, and not proved to be appurtenant to the dwelling-house, was not the subject of burglary, and is not, under a statute covering houses, outhouses, buildings, sheds and erections, within two hundred yards of and appurtenant to such dwelling-house.

CONVICTION of burglary. The opinion states the case.

E. G. Graydon, for appellants.

Mr. Cothran, contra.

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MOLVER, A. J. This was an indictment for burglary in breaking and entering, in the night-time, into a mill-house and stealing therefrom flour and corn. The mill-house was situated about seventy-five yards from the dwelling-house of the prosecutor, on the opposite side of a public road, and was not inclosed. No one slept in it. The Circuit judge charged the jury "that the mill was the subject of burglary, and instructed them that if they believed that the defendants broke into it in the night time and carried away the flour and corn, as alleged in the indictment, they must find them guilty." To this charge and instruction exception was duly taken, upon the ground that the mill-house was not the subject of burglary. The defendants have been found guilty, were sentenced "to be imprisoned at hard labor in the State penitentiary for three years, and to pay a fine of one dollar." Exception was also taken to so much of the sentence as imposed a fine.

At common law the offense of burglary consisted in breaking and entering the dwelling-house of another with intent to commit a felony therein; and the term "dwelling-house" was held to include all outhouses contiguous to the dwelling and parcel thereof, if within the curtilage. 4 Bl. Com. 224; 2 Russ. on Crimes, 14; 2 Bish. on Crim. L., § 104. These authorities show that to bring an outhouse within the curtilage of a dwelling-house, it must be parcel of or appurtenant thereto, and be connected therewith by being under the same roof or within the same inclosure. For, as is said by Blackstone, "if the barn, stable or warehouse be *parcel* of the mansion-house and *within the same common fence*, though not under the same roof or contiguous, a burglary may be committed therein, for the capital house protects and privileges all its branches or appurtenants, if within the curtilage or homestall." So, in Russell, it is said, "any outhouse within the curtilage or *same common fence* as the mansion itself was considered to be parcel of the mansion." And in Bishop's work: "The term 'dwelling-house' also includes the entire cluster of buildings *not separated by a public way*, which are used for purposes connected with the habitation." And in 1 Bouv. Law Dict. 391, the term "curtilage" is defined to be the open space situated *within a common inclosure*, belonging to a dwelling-house. It is very manifest, therefore, that this conviction could not be sustained at common law, for the mill-house was not within the common inclosure of the dwelling-house, but was separated therefrom by a public highway,

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and there is no evidence that it was parcel of or appurtenant to the dwelling-house. For all that appears in the case submitted here, it might have been as distinct from and independent of the dwelling-house as if it had belonged to another person. Indeed the case, as originally submitted, did not even show that the mill-house belonged to the owner of the dwelling-house, though, on the argument here, it was agreed that the case should be amended by inserting that fact. But that fact alone is not sufficient to bring the mill-house within the class of houses which were the subjects of burglary at common law.

The next question is, whether the mill-house in question can be brought within the class of houses which, by the act of 1866 (Gen. Stats., ch. CXXIX, § 32) have been declared to be subjects of burglary. The language of that statute is as follows: "With respect to the crimes of burglary and arson, and to all criminal offenses which are constituted or aggravated by being committed in a dwelling-house, any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer, or person who watches there, with a view to the protection of property, shall be deemed a dwelling-house; and of such a dwelling-house, or of any other dwelling-house, all houses, outhouses, buildings, sheds and erections, which are within two hundred yards of it, and are appurtenant to it, or to the same establishment of which it is an appurtenance, shall be deemed parcels."

Now, in order to bring this mill-house within the terms of this statute, it is not sufficient to show that it is situated within two hundred yards of the dwelling-house, but it must also appear that it is an appurtenance of the dwelling-house, or of the establishment of which the dwelling-house is itself an appurtenance. Of this there is no evidence whatever. It does not appear that the dwelling-house of the prosecutor was the appurtenance of a farm or plantation of which the mill was a part and parcel, nor does it appear what the character of the mill was, whether a merchant-mill or an ordinary mill attached to and forming a parcel of a farm or plantation.

The question raised by the second exception cannot arise under this view of the case, inasmuch as the judgment below must be set aside, and of course, the sentence based upon such judgment must go with it.

The judgment of the Circuit Court is set aside and a new trial ordered.

New trial granted.

WILLARD, C. J., concurred.

WALLACE V. LARK.

(12 S. C. 576.)

Sale—immoral—knowledge of vendor.

It is no defense to a note given for a horse, that the horse was purchased for use in, and was actually used in, the Confederate service in the civil war.* It seems that mere knowledge of the vendor that the purchaser intends to make an illegal or immoral use of the article purchased is not sufficient to defeat an action for the purchase-price.

ACTION on a note. The plaintiff had judgment below. The opinion states the facts.

W. H. Wallace, for plaintiff.

J. W. Ferguson, for defendant.

McIVER, A. J. This was an action brought against the defendant as the guarantor of a note under seal, executed by one Kay Burton, in favor of Dennis Lark. The defendant, in paragraph 3 of his answer, set up the following as a defense: "That the note complained upon was given as the purchase-money of a horse to be used in the Confederate service during the late war, and that said horse was actually so used." To this defense the plaintiff demurred, and the Circuit judge sustained the demurrer, from which the defendant appeals. That the demurrer was properly sustained is manifest from the fact that there is no allegation that either the plaintiff or his assignor, the payee of the note, knew at the time the note was given the purpose for which the horse was purchased. It is true a demurrer admits every fact stated in the pleading demurred to, but here the only facts stated are: 1. That the note was given for a horse to be used in the Confederate service. 2. That the horse was actually so used. Neither of these facts necessarily involves the idea that the vendor knew, *at the time of the sale*—the time when the contract was entered into—the purpose for which the horse was bought. The case, therefore, cannot even be brought within the rule established by the cases of *Lightfoot v.*

* To same effect *Henderson v. Waggoner* (3 Lea, 133), 31 Am. Rep. 501; *Brunswick v. Valteau*, ante, 119, and note, 123.

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Tenant, 1 B. & P. 551 ; *Langton v. Hughes*, 1 M. & S. 593 ; *Cannan v. Bryces*, 3 B. & A. 179 ; *De Groot v. Van Duzer*, 20 Wend. 390, that *mere knowledge* on the part of the vendor that the purchaser intends to use the article purchased for an illegal or immoral purpose will be sufficient to defeat an action for the purchase-money.

We are not disposed, however, to rest the case here, but are rather inclined to adopt the rule laid down by Lord MANSFIELD in *Hodgson v. Temple*, 5 Taunt. 181, that *mere knowledge* of the vendor that the purchaser intends to make an illegal or immoral use of the article purchased is not sufficient to defeat an action for the purchase-money. There must be something more ; something to show that the vendor was to participate in the illegal transaction, or that his intention in making the sale was not the ordinary purpose to dispose of his goods to the best advantage, but to aid or promote the illegal or immoral purpose for which the animal was bought. The rule thus laid down is sustained in the following cases: *Michael v. Bacon*, 49 Mo. 474 ; s. c., 8 Am. Rep. 138 ; *Hubbard v. Moore*, 24 La. Ann. 591 ; s. c., 13 Am. Rep. 128 ; *Mahood v. Tealza*, 26 La. Ann. 108 ; s. c., 21 Am. Rep. 546 ; *Tedder v. Odom*, 2 Heisk. 68 ; s. c., 5 Am. Rep. 25. In the last-mentioned case the question now before this court was before the Supreme Court of Tennessee, with the additional fact that there the vendor knew, at the time the note was given, the purpose for which the horse was bought, and it was held that bare knowledge on the part of the vendor that the purchaser intended to make an illegal use of the horse did not violate the note given for the purchase-money. This case cannot be brought within the rule laid down, quite reluctantly as it would seem, in the case of *Converse v. Evins*, 5 S. C. 52 ; following the case of *Hanauer v. Woodruff*, 15 Wall. 439 ; for in those cases the consideration of the notes sued upon was bonds which were adjudged to be nullities, and as never having had any legal existence as property, and of which no lawful use could be made, while here the consideration of the note sued upon is a horse, which was always property of which a lawful use could be made. Nor does it come within the doctrine laid down in the case of *Hanauer v. Doane*, 12 Wall. 342, for there the action was upon a note given for supplies and commissary stores sold to a recognized supply contractor — in fact it was practically a sale to the Confederate government — while here the sale was to a private individual.

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The defendant also demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, and the Circuit judge having sustained this demurrer, the plaintiff also appeals. In this we think there was error.

[Omitting this point.]

The judgment of the Circuit Court, in so far as it sustains the demurrer to paragraph 2 of the answer, is affirmed, but in so far as it sustains the demurrer to the complaint, it is reversed.

Judgment modified.

WILLARD, O. J., concurred.

ROBSON V. MILLER.

(12 S. C. 586.)

Sale — warranty — what words amount to

Defendant sold a fertilizing preparation, in bags with tags attached, stating the chemical ingredients. He also issued circulars, using the words, "highest standard," "under my own name and guarantee," "prepared under my inspection and control," "compounded of the purest materials;" and referring by name to the chemist who made the analysis, adding, "whose name gives a warrant for its high character," etc. Held an express warranty, not dependent upon the correctness of the chemical analysis.

ACTION for the price of a fertilizing preparation, sold in bags, to which were attached tags stating the chemical constituents. The plaintiff had also issued the following circular:

"CHARLESTON, S. C., November 16th, 1875.

"Having been engaged for twenty years in the guano trade, with eminent success, I deemed it advisable to introduce fertilizers under my own name and guarantee. I have made arrangements to have prepared a guano under my inspection and control, called Robson's cotton and corn fertilizer. This guano is of the highest standard. It contains, among other valuable ingredients, three per cent of ammonia, one and one-half per cent of potash, and fourteen per cent of available phosphate.

"I have also prepared for me a compound acid phosphate of the highest standard. These fertilizers are compounded of the purest materials, and are manipulated and tested under the supervision of

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Dr. St. Julian Ravenel, of this city, whose name gives a warrant for its high character and adaptation for our soil.

"I take this occasion to return my thanks to those who have so largely patronized the fertilizers heretofore offered by me, and in soliciting their favorable attention to another. I pledge my best efforts to meet a continuance of confidence by keeping the highest standard of fertilizers adapted to cotton and corn."

The plaintiff requested the presiding judge to charge, among other things:

4. As matter of law, whenever there is an express warranty no implied warranty can arise. The express warranty, in this case, applies only to the constituent elements of the acid phosphate and the supervision of Dr. Ravenel. If the proof offered by the defendant fails to show that these elements and this supervision were wanting, as alleged, there was no breach of warranty, and the plaintiff must recover.

The opinion states other facts. The defendant had judgment below.

B. F. Whitner, for appellant.

A. T. Broyles, for respondent.

WILLARD, C. J. This was an action for the sale of goods, consisting of an article intended as a fertilizer, described as "Robson's Acid Phosphate." The defense was a counter-claim in the nature of a recoupment, on the ground of the failure of the article sold to conform to representations made by the plaintiff and intended as a warranty.

On the trial a verdict was rendered for the defendant, and the plaintiff now brings before us certain exceptions, alleging error in the rulings of the Circuit judge, and asks a new trial. These exceptions will be separately considered.

[Omitting a minor exception.]

The remaining exceptions are to the refusals of the Circuit judge to charge propositions submitted by the plaintiff for that purpose, and for alleged errors in the matters actually charged by him. The first proposition of the requests to charge is as follows:

"That when an article of a certain or definite nature is to be manufactured, the seller can, in no sense, be considered as war-

ranting it to be appropriate to the use which the buyer intends to apply it, whether the seller be informed of such intention or not."

It may be remarked that this purports to be a rule of implying warranty where no express warranty or representation is given, and as such is inappropriate to the case in hand, which is altogether one of express warranty, or as the plaintiff views it, of misrepresentation. But the proposition is, in itself, unsound in the form stated, inasmuch as it embraces cases as applied to which it would lead to conclusions contrary to law. It is equivalent to saying that when one undertakes to manufacture for another an article that has a known value and use, it is not an implied condition of the contract that the manufacturer shall produce an article fit for the use to which such article is commonly put. This is equivalent to saying that a baker is not bound to produce bread that can be eaten. The proposition was therefore untrue, and was properly refused.

The second proposition submitted for charge was as follows:

"If the article sold failed to accomplish the results for which the defendant bought it, and there was no fraud on the seller's part, and both buyer and seller relied on the same source of information, to wit, the analysis of the chemist, the plaintiff is entitled to recover."

This proposition tended to present the question as depending wholly upon the nature and quantity of the constituent chemical elements of the commodity at the time of sale, whereas the question of the value of the commodity depended upon the fact whether it would *act* in a particular manner when composted with certain other materials in the manner prescribed by the plaintiff, so as to make a valuable fertilizer. A circular, issued by the plaintiff, was in evidence. It was for the jury to say whether the statements of that circular constituted the basis of the purchase by the defendant. In this circular the plaintiff stated that he had deemed it advisable to introduce fertilizers—using his own words—"under my own name and guarantee." The circular does not give the chemical composition of the "Acid Phosphate." The plaintiff, in his testimony, states the value of his article to depend on the fact that when composted in a particular manner with certain materials it retains the ammonia evolved, which would otherwise escape, in a form suitable for application to plants. He alleges that his "Acid Phosphate" is

not a manure in itself, but that it becomes such under the treatment prescribed for it.

It appears by the plaintiff's own case that the question at issue was not confined to the inquiry whether the article sold had, at the time of sale, certain chemical constituents of a certain character and in certain quantities.

The proposition under consideration was defective in tending to withdraw the attention of the jury from the material features of the case, and confine them to the narrow question whether such constituents were present at the time of sale. It might well be, that as it regards the analysis of the article in its condition at the time of sale, both buyer and seller might be compelled to rely on the representations of a chemist, but that fact, even in the absence of fraud on the part of the seller, could not, in itself, become decisive of the plaintiff's right to a verdict, as it was made to be by the plaintiff's proposition.

The fourth request was charged, subject only to the modification of "extending the express warranty to the good results of a fertilizer, as well as to the ingredients." This modification, as well as the remainder of the charge, is in substantial harmony with what has been already held herein, and the appeal should be dismissed.

Appeal dismissed.

MOLVER, A. J., concurred.

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CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

LOVE V. MASONER.

(8 Baxt. 24.)]

Evidence — seduction — previous unchastity — plaintiff's privilege as witness

In an action brought under a statute for damages for the plaintiff's own seduction, evidence of the plaintiff's previous unchastity, although unknown to the defendant or the public, is admissible in mitigation of damages.

Fornication not being a penal offense, the plaintiff, examined as a witness on her own behalf in an action for her own seduction, may be required to testify concerning previous alleged acts of unchastity with others.

ACTION of seduction. The opinion states the case. The plaintiff had judgment below.

A. H. Wilson, for plaintiff in error.

McKee, for defendant in error.

NICHOLSON, C. J. This action was brought in the Circuit Court of Greene county by Margaret Masoner against James Love, under section 2801 of the Code, to recover \$5,000 damages for her own seduction.

The declaration contains two counts — one for seduction proper and the other forcible, carnal knowledge. Two pleas were relied on — the general issue and the statute of limitations of one year

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The jury found a verdict for \$2,800 on the first count, on which judgment was rendered. Defendant has appealed in error.

Margaret Masoner was examined as a witness in her own behalf. In the course of her examination by defendant's counsel, she was asked if she had not had sexual intercourse with several other men prior to her first intercourse with defendant, the names of the men and the times and places being specified. Objection being made, the witness was not required to answer, although in her previous examination she had said, without objection, that no person had ever had connection with her before.

Defendant afterward introduced some four or five of the men before referred to as having had connection with her, and asked each one the question, giving times and places, as to his having had connection with plaintiff. The answers of the witnesses were all excluded upon the objection of plaintiff.

Defendant was also examined as a witness, and in the course of his examination he stated that he did not know that he knew any thing against plaintiff's reputation at the time of his first going to her father's house, or when he had connection with her.

In his charge to the jury the judge said: "Acts of sexual intercourse with other men than defendant prior to her seduction by defendant, if unknown to him or the public, cannot mitigate his offense; but if [such acts were known, either to defendant or the public, it is otherwise, and will mitigate the damages."

The errors mainly relied on for a reversal are assigned upon the rejection by the court of the evidence of previous acts of sexual intercourse by plaintiff with other men upon the charge of the court, which states the reason of the rejection of the testimony.

It is manifest that the Circuit judge acted upon the authority of the case of *Lea v. Henderson*, 1 Cold. 146, in excluding the testimony offered, and in his charge to the jury. That was an action by the mother for the seduction of her daughter, in which the mother claimed the damages and not the daughter. In his charge to the jury in that case the Circuit judge stated, in substance, "that if any other person had had intercourse with Nancy Cruze before her alleged seduction by the defendant, but that fact remained unknown to defendant, as well as to the public, at the time of the seduction, so that her character or reputation was not affected thereby at the time she was seduced by the defendant, then the fact of such intercourse with a different person prior to her seduc-

tion by the defendant should not be looked to by the jury in mitigation of the damages in the action."

In a suit by the parent for the seduction of a daughter the plaintiff may recover damages beyond the loss of services. Indeed, the loss of service is in most such cases merely imaginary; the real injury is the wound to the parent's feelings. 3 Phil. 533. "In point of form the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact that this is an action brought by a parent for an injury to his child. In such a case I am of opinion," said Lord ELDON, in *Bidford v. McKowl*, 3 Esp. N. P. C. 119, "the jury may take into their consideration all that the parent can feel from the loss. They may look upon him as a parent losing the comfort, as well as the service of his daughter, in whose virtue he can feel no consolation, and as the parent of other children whose morality may be corrupted by her example."

When, therefore, the Circuit judge told the jury, in the case of *Lea v. Henderson*, that proof of prior acts of sexual intercourse by the plaintiff with other persons could not be considered in mitigation of damages, if the defendant and the public were ignorant of those prior acts, he meant that the damages which the mother in that action was entitled to recover were not to be affected by the fact that her daughter had been guilty of former acts of fornication, if those former acts were unknown to defendant and to the public.

This charge, upon appeal to the court, was assailed as incorrect, but Judge MCKINNEY held it correct, saying, "this principle, though said to be incorrect, is not shown to be so by any authority, or even by any reason satisfactory to our minds. The application of the principle is admitted to be a rigid one, but still we think it is correct in law, in ethics, and in reason." He adds: "The principle of the charge is no new principle. The charge only applies an established principle to a new statement of facts. The general principle is that evidence is admissible of facts, and circumstances offered for this purpose ought to be those only which belong to the act complained of," and for this 2 Greenl. on Ev., § 266, is cited.

The question arises, whether the general principle that evidence is admissible of facts and circumstances only which go in aggravation or in mitigation of the *injury itself* was correctly applied upon the facts assumed in the charge? The facts assumed were that

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defendant had seduced plaintiff's daughter, but she had been guilty of unchastity with others before, yet these former acts of fornication had been concealed from defendant and from the public. The injury complained of by plaintiff was that defendant, by seduction, had robbed his daughter of her chastity, and thereby wounded his feelings as a parent, and deprived him of the society and the example of a virtuous daughter. But according to the assumed facts, the daughter had lost her chastity by former acts of sexual intercourse. This was unknown to defendant, who proceeded upon the belief that plaintiff's daughter was surrendering her chastity to him. His guilt may be none the less, unless the fact that she had already yielded her virtue to others rendered her more easily accessible by defendant. In this point of view, proof of former acts of fornication might be competent upon the question whether plaintiff's daughter yielded her virtue willingly, or as to what amount of persuasion or importunity was requisite to induce her to yield. It cannot be held that the man who prevails by arts, persuasion, and entreaties upon a woman who has yielded before to such appliances should be held equally guilty and equally responsible with him who by flattery or false promises has first robbed the virgin of her chastity. It seems to us clear, in the aspect of the case, that in ascertaining the degree of defendant's guilt in the perpetration of the injury, and consequently in assessing the damages for the injury, the fact that plaintiff's daughter had been guilty of former acts of fornication goes directly in mitigation of the injury itself, and belongs to the act complained of, as proper to be considered in determining the extent of the injury. In another view we think the evidence of former acts of fornication by plaintiff's daughter were competent, although unknown to defendant and to the public. The injury complained of by plaintiff was the loss of a virtuous daughter, and of her companionship and example to the other children, and the wound to the feelings of the parent produced by this injury. The rejected proof, however, would show that plaintiff was under a delusion as to the virtue of his daughter, she had already surrendered her chastity before she yielded to the embrace of defendant. Can it be said that the injury to a parent whose really virtuous daughter has been overcome and debauched by the appliances of the seducer is not greater than the seduction of one who had already lost the jewel of chastity? The fact that she was not virtuous when last seduced connects itself directly with the injury

complained of, as a circumstance in mitigation of the damages. The circumstance that the defendant and the public were ignorant of her former derelictions cannot alter the fact that she had ceased before to be a virtuous woman. The damages are to be governed by the real injury, and not by the estimate placed by a deluded parent upon the character of a daughter whom he regarded as virtuous, but who had only maintained the appearance of virtue by concealing her unchastity from her parents and the public.

But how does this question stand upon the authorities? In the case of *Reed v. Williams*, 5 Sneed, 582, Judge MCKINNEY laid down the law as follows: "That the general character of the female for chastity is considered to be involved in the issue, and may, therefore, be impeached by general evidence. But she cannot be interrogated as to acts of unchastity with others; though the persons who may have had criminal intercourse with her may be called to testify to the facts. The impeachment of her chastity, however, would not go to defeat the parent's right of action, but only in mitigation of damages." For this principle 2 Greenl., § 577, is cited, which fully sustains it.

The doctrine is here broadly asserted that persons who have had criminal intercourse with plaintiff's daughter may be called in "to testify their own criminal intercourse with her, and the time and place."

In a note to 2 Greenl. on Ev., § 577, we find the following from Taylor on Evidence: "In modern times it has frequently been held that in an action for seduction, and on indictments for rape, the principal female witness might be cross-examined with the view of showing that she had previously been guilty of incest with the defendant, or even with other men, or with some particular person named; and when she has denied the facts imputed, witnesses have been called for the purpose of contradiction." In support of this numerous authorities are cited.

In actions of criminal connection the husband puts the character of his wife in issue, just as the father does that of his daughter in actions for seduction, and the rules of evidence are the same. In actions of criminal connection the defendant may show, in mitigation of damages, the bad character of the wife, either generally, or by proof of particular instances of unchastity. 2 Greenl., § 56.

In 3 Phil. on Ev. 533, we find the following: In another case it was held by Lord ELLENBOROUGH that where a specific breach of

chastity is found by the defendant's witness (as that the daughter has had a criminal connection with another person before her acquaintance with the defendant), still that evidence of general character is not admissible, and that the plaintiff ought to be restricted to the disproving of the specific breach of chastity alleged by the defendant. Such general evidence, however, has been admitted in several cases, where the daughter has been charged with acts of misconduct or prostitution with other persons than the defendant, as where the charge has been conveyed by means of the cross-examination of the daughter, or where witnesses "have been called to speak to the facts."

Evidence of the circumstances of the seduction may be given, and the defendant may show that the previous conduct of the girl was lewd and lascivious. *Bracy v. Kibbe*, 31 Barb. 273.

In a case for seduction, evidence of the intercourse of the plaintiff's daughter with other men may be given in evidence under the plea of not guilty. *Berry v. Watkins*, 7 C. & P. 308, cited in note, p. 633, Sedgw. on Damages.

In the case of *Thompson v. Clendenning*, 1 Head, 295, a witness was allowed, without objection, to prove that he had had criminal intercourse with plaintiff's daughter prior to the time when defendant was charged with her seduction. The attention of this court was called to the testimony in a manner which shows that it attached much importance to it.

Without multiplying authorities on this question, we have referred to a sufficient number to show an unbroken current in support of the proposition, that acts of unchastity by the seduced party prior to her seduction by the party sued are legitimate proof in mitigation of damages, and in no case do we find that the competency of this proof is made to depend upon the knowledge of the defendant or of the public, or to the previous acts of unchastity.

We are constrained, therefore, upon reason and authority, to dissent from the holding in the case of *Lea v. Henderson*.

It is proper, however, to remark that in the present case the plaintiff is the party who claims damages for her own seduction, and for that reason occupies a different position from that occupied by the plaintiffs in the cases which we have been considering. She comes forward, averring that she had a fair name and reputation for virtue and chastity, and that defendant, by his artful and de-

ceitful appliances, had seduced her into the surrender of her virtue, and consequently of her good name, and for this she claims compensation in damages.

In such a case the reasoning and the authorities already adduced apply with greater certainty and force than in the cases where the parent is the plaintiff claiming damages, and the daughter merely a witness to support the claim. The result of our examination of the case is, that the Circuit judge erred in excluding the proof of acts of unchastity by the plaintiff prior to her alleged seduction by defendant, and that the charge on this subject was also erroneous.

The Circuit judge also refused to require the plaintiff to answer specific questions as to former acts of unchastity with designated men prior to her alleged seduction. It has been decided several times in this State that the witness in such a case is not compellable to answer such questions, for the reason that we had a statute which made fornication a penal offense, and that a witness should not be made to criminate himself. We have now no such statute, and fornication no longer punishable except civilly. This being so, we know no sufficient reason why a plaintiff who comes forward to make out her case by her own testimony should not be subjected to the same rules in her examination as other witnesses. The great object sought to be reached in every case is its truth, and if the plaintiff in a seduction case chooses to rely upon her own evidence, she should not be allowed to defeat the ends of justice by withholding any part of the truth of the case. If she can answer truly that she has kept her chastity intact until the defendant despoiled her, she ought to have the full benefit of her own vindication. If, on the contrary, she has been guilty of former acts of unchastity, she ought not to be allowed to suppress the truth, or if she does, she ought to be subject to contradiction by other witnesses.

For the errors indicated the judgment will be reversed and a new trial awarded.

Judgment reversed.

Willard v. Willard.

WILLARD V. WILLARD.

(6 BART. 297.)

Marriage — divorce — duress.

A marriage procured by duress is voidable, although this is not among the statutory causes for divorce.

BILL for divorce. The opinion states the case. The defendant had judgment below.

J. G. Deaderick, for complainant.

E. N. Griffith, for respondent.

McFARLAND, J. This bill for divorce was filed the 18th of June, 1872. It charges that in November, 1862, the complainant was, by force and arms, arrested upon the highway by one Jacob Lob, a brother of the defendant, and under actual duress, forced to submit to the form and ceremony of a marriage with the defendant. That within a few days, as soon as he could escape the duress, he abandoned the defendant and has never lived with her, and has never recognized her as his wife. The bill further charges, that some three months after the marriage the defendant gave birth to an illegitimate child. The prayer is for a divorce, or that the marriage be declared void.

A demurrer was filed, upon the ground that none of the statutory causes for divorce are charged. This demurrer was sustained.

This, we think, was erroneous. The grounds set forth in the statute are made causes for granting a divorce where the marriage had been lawfully solemnized with the consent of the parties, and are either causes then existing or subsequently transpiring.

But in addition to this, marriage is so far an ordinary civil contract, that its basis is the mutual consent of the parties. If either of the parties are incapable in law of giving consent, the marriage is voidable, as if one party be insane. *Cole v. Cole*, 5 Sneed, 57; *McKinney v. Clark*, 2 Swan, 321.

It would seem to require no argument to show that a consent given under actual duress obtained by force is no consent; and although the form of the marriage has been observed, the essence of the contract is wanting.

Let the decree be reversed and the cause remanded for an answer.

Decree reversed and cause remanded.

DE SOTO BANK V. CITY OF MEMPHIS.

(8 Baxt. 415.)

Taxation — exemption — bank building.

Under a statute exempting from taxation a lot of ground for the use of a private banking institution, the bank is not entitled to exemption of such parts of the banking house as are leased to others. (See note, p. 531.)

THE opinion states the case.

FREEMAN, J. In the case of the De Soto Bank it is admitted that a tax has been levied properly on the shares of the stock, if the shares of stock are liable for such a tax. We need not further discuss this question, as the principles announced in the other cases on this question settle it. But the city has levied a tax on the bank building and ground. This is claimed to be also exempt under the clauses of the charter, which provide "that the institution shall pay an annual tax of one-half of one per cent on each share of capital stock, which shall be in lieu of all other taxes whatever." The other clause of the charter bearing on the question is the fourth section, which, after conferring the usual banking powers on the corporation, adds, "and may purchase and hold a lot of ground for the use of the institution as a place of business, and at pleasure sell and exchange the same."

Without discussing at length the argument or authorities cited in support of the exemption of the bank building, we content ourselves by extracting from one of the cases what we deem to be the true principle on this question, and the one held by a large preponderance of the authorities, which we have carefully examined. The company is a private corporation, created for banking purposes. It has not conferred on it the general power of purchasing or of becoming owner of real estate, but has the special grant of power to purchase and hold a lot of ground for the use of the institution as a place of business. In the language of the court in the case of *State v. Commissioners of Mansfield*, 3 Zabr. 513, "this power is limited to, and can only be exercised to effect the purposes for which it was conferred by the government. It is a part of the franchise, and the exercise of the corporate franchise being restrictive of individual rights cannot be extended beyond the letter and

De Soto Bank v. City of Memphis.

spirit of the act of incorporation." We add, that there is no power conferred to hold real estate for any other purpose than "for the use of the institution as a place of business." Such is the language of the charter, and is the only privilege granted. It cannot be extended beyond its terms. To quote again from the above case: "But there must be a limit somewhere to this power (even if it were not defined in the charter), to extend its operations, and hold property exempt from taxation under the exempting clause, that limit must be fixed where the necessity ends and mere convenience begins." See cases cited in the above case; see, also, *State v. Flarett*, 4 Zabr. 371; 3 Harr. 73. We might cite numerous other cases in support of this principle, but deem it too clear to admit of any doubt. The only case cited in support of the exemption, and which we think sustains it, is the case of *New Haven v. City Bank*, 31 Conn. 108. With the reasoning of this opinion and conclusion of the court we are not satisfied; nor do we think it accords with the weight of authority on the question.

The bill in this case avers that the bank purchased in 1866 a lot of ground, and erected a building thereon, investing in lot and building \$100,000 of its capital stock, and have held and occupied it since for their business, but that the bank does not occupy the whole building for the purpose of the bank, but having constructed the building, the bank occupies a portion, and leases out the balance. Under the principle announced, the exemption can only reach and cover so much of said building as is necessary for the use of the bank, for the convenient carrying on of its business as a banking institution, and is so used. The balance must be held subject to taxation as other property, and is not covered by the exemption clause of the charter.

This case having been suspended on a petition for rehearing on June 3, 1874, FREEMAN, J., announced that the opinion of the last term is adhered to; we have no doubt of its correctness.

NOTE BY THE REPORTER.—In *New Haven v. City Bank*, 31 Conn. 108, it was held that the capital of a bank embraces all its property, real and personal; that where the capital stock of a bank is exempted from taxation by its charter, its banking-house is equally exempt with every other part of its capital; and that if a bank, in violation of its charter, has erected a building not needed for banking purposes, the building is not, for that reason, liable to taxation as the property of the bank when it otherwise would not be, but the bank is liable to be proceeded against by the State for the violation of its charter. In this case the bank leased part of its banking building. The court said: "The primary object of the bank in erecting the building was the accommodation of the proper business of the bank, and the temporary renting of the room was but an incident of the ownership, neither affecting the title to the property nor the right to hold it free from taxation."

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(6 Bart. 559.)

Taxation — corporation — capital stock and shares.

Stockholders in a moneyed corporation are liable to taxation on their shares, although the capital stock has also paid a tax. (*See note, p. 557.*)

THE opinion states the case.

Morgan & Randolph, for plaintiff.

Smith, Gantt, Waddell & McDowell and *Brown*, for defendant.

FREEMAN, J. The case of *City of Memphis v. Enoch Ensley*, stockholders in Memphis Gas Light Company, presents a different question in its facts from any we have heretofore discussed in the previous questions on the subject.

In this case the Gas Light Company have all their capital stock invested in Gas Works Manufactory and other appurtenances necessary to the production and supply of gas. This property has been regularly assessed for taxes, and the same was paid. A tax, however, has been assessed on the shares of stock owned by the stockholders at their market value as part of the personal property of said stockholders, the stock being valued at fifty cents on the dollar as the market value. It is now claimed that there is double taxation, on the ground that the tax on the capital stock as invested is a tax on the shares, and that this last tax cannot be collected by law. There is no contract in the case for exemption, but it stands on the naked question whether a tax on the capital stock is a tax on the stockholders, and we suppose it must also be assumed, to fully make out the defendant's case, that the tax on the capital stock is the same tax as the one imposed on the stockholders or shares of stock, and therefore is double taxation, or a tax levied twice on the same property. However, it may be that the last assumption may not necessarily be involved in the first.

We may say in advance that here we are not trammelled by the controlling influence of the Supreme Court of the United States, as a revisory court, should there be any conflict between the views of that court and our own, and may fully settle the question on

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the weight of authority and legal reason, as applied to the facts of the case.

It is said this is a pure question of authority, but this is not true, as it is largely a question of fact, at least in one important aspect of it; that is, whether, in fact, a tax on the capital stock is a tax on the shares of the stock in such a sense as to be double taxation to tax both. We have no contract in this case to be construed by the actual or assumed intention of the legislature; on the proposition, as a matter of fact, we will give what hereafter appears to us to be the effect of such a tax on the capital stock, or a tax on the shares of stock. At present we look for the law of the case, so far as settled in our own State, and hastily refer to the views of some of our sister States.

We have the case of *Union Bank v. State*, 9 Yerg. 490, in our own State, and if the case settles a definite rule on the subject, unless we can see high and controlling reasons to the contrary, we shall feel bound to follow it.

In this case, by the act of 1836, a tax had been assessed on the capital stock, amounting to about \$190,000, at so much on each hundred dollars. It was agreed that the tax assessed was on the capital stock of the bank held by individuals, and that the bank was required to pay it. It appears from the statement of the case by the reporter, as well as from the opinion, that the stockholders presented their rights in the case.

Judge TURLEY, in commencing the opinion, says: "The question involves the taxing power of the State, the privileges of an incorporated constitution, and the rights of non-resident owners of our bank stock, and as appears also in the latter part of the opinion, the liability of resident stockholders. This is correct, for the act fixing the tax levied it on shares of stocks, but required it to be collected from the bank on the amount of stock paid, and made it the duty of the cashier to list the amount of the stock owned in his bank by the several stockholders." Under the agreed case, that if the bank was in any way liable, the court should render such judgments as the law warranted, the question of the liability of the shares of the stock was fairly before the court. The court clearly held in this case that under the provision in the charter of the bank, "that in consideration of the privileges granted by the charter of the bank agrees to pay annually the one-half of one per cent on the amount of the capital stock paid in by the

stockholders other than the State," the franchise, and the capital stock as necessary to the enjoyment of the franchise, could not be taxed, and to do so would impair the obligation of the contract. It also held that the shares of the stock owned by the State as individual property of the person owning it might be taxed, notwithstanding the exemption by contract of the capital stock, but that this must be done *ad valorem*, or upon its market value, under the Constitution of 1834.

In this opinion Judge TURLEY states the view of the court on the question of the distinction between the capital stock and the shares of stock owned by individuals, saying it is a mistake to suppose that the stock of an individual consists of so much money owned by him in the bank. The money in the bank is the property of the institution to the ownership of which the stockholder has no more claim than a person has who is not at all connected with the bank. He then adds that the stockholder is the owner of his stock, and may transfer it at his pleasure, and that a tax on the shares is in the nature of a tax on income, he having previously defined bank stock to mean "the individual interest of a party in the dividends as they are declared, and a right to a *pro rata* distribution of the effects of the bank on hand at the expiration of the charter." If, then, the exemption of the capital stock did not exempt the shares of stock, it is clear that upon the reasoning of the court it must have been on the ground that they were not the same properties, and the one did not include the other.

Such was the holding of the court, as we understand it, beyond all question. We are pressed to reserve or disregard this view in arguments of exceeding ingenuity as well as rare ability and learning.

We have cheerfully examined the cases presented from the courts of our sister States, and their reasoning, and concede that in all of them urged upon our attention by counsel for their corporations, in which the direct question is presented, the doctrine is announced for which they contend with more or less distinctness, and in several of them with great force of reasoning. But we do not see that the reasoning is so clear and demonstrative as that we should overrule a well-considered opinion of our own court in a case which was argued by the first talent this State has produced, and decided by a court the equal of any in any sister State that has held a different view. The cases referred to, or some of them, are *Johnson v. Common-*

wealth, 7 Dana, 363; *New Haven v. City Bank*, 31 Conn. 108; *State ex rel. Colt v. Power*, 4 Zab. 40; *Stato v. Brannum*, 3 id. 493, together with a number of others that need not here be noted. The question whether the tax on the capital stock is a tax on the shareholders or shares, and *e converso*, whether a tax on the shares is a tax on the capital stock, and the identity of the two things or properties, is one of that character of questions in which so many elements of identity and also of diversity are presented as render it exceedingly difficult to say on which side is the preponderance. It is certainly true that the stockholder who pays his own hundred dollars to the corporation, and receives therefor a certificate of stock, has not thereby made himself the owner of one hundred dollars of money in the corporation, and also of one hundred dollars of property in stock, nor has the aggregate amount of money been increased by the operation. This is conceded. But then the certificate of stock does not, in fact, import that he owns the one hundred dollars in the bank. What then is the element of property or value in the share of stock? It is a chose in action, an intangible thing evidenced by writing, and certainly has a market value as such, subject to rise and fall under the influence of certain laws of trade, or rules that govern the market for the commodity more or less distinctly defined. Of these elements the leading one is the amount of dividend to be derived from the investment, and that arises from the prudent and skillful management of the institution and its business, together with inherent advantages for profitable use of the business itself. Without going into the various circumstances that may render the dividends large or small, it is certain that ordinarily their amount makes up the larger share of the value of the stock; the element of ultimate safety of the fund invested, and reimbursement at the termination of the corporation life, having comparatively little influence in fixing the market value of the stock in the larger number of cases. This being so, the dividends thus to be received by the holder, it seems to us, are the largest element of value which enter into this kind of property, and that on which a tax on the share is laid, and on which the burden falls directly, and when the stock is taxed at its market value, it bears a burden in proportion as the owner receives an income from it, and in this view it is a tax on income derived from stock to a greater extent than any other element of property in the thing taxed, but not on the money paid for the stock. This tax is

not paid out of the capital stock, nor does it reduce its amount in the slightest. That remains in the bank when the stock is bank stock, and yields the precise amount of profit, and the same dividends are declared on it as if no tax were paid by the stockholders. It is true, the amount of this income or dividend in the hands of the stockholder is reduced to him on its value or amount, by the amount he is compelled to pay on it to the government as a tax; but this is what occurs in the value of all property subject to taxation. He owns the whole property in the dividend declared, but by reason of the ownership he owes the government a certain amount as a tax for his protection, which he must pay in common with every other citizen, but he pays it only on its real value, that is, mainly on the amount of income to be derived from it, or dividend to which he is entitled by reason of his ownership of the property.

We think all this very clear, and therefore that the simple question in this aspect of the case is, whether a tax on income derived from property can be sustained where the property from which that income is derived has also paid a tax, whether the same in amount or not.

In this case the capital stock has not paid the same amount of tax because it has paid *ad valorem* on the property at full value, and the stock is assessed at its market value, which is only fifty cents on the dollar, assuming that the property is worth more than fifty cents on the dollar of its cost. The idea suggested by the proposition thus announced suggests the consideration of the other aspect of the case — is the tax on the capital stock a tax on the shares? It must be admitted that this tax would lessen the amount of dividend on the shares to the extent it was paid, and the value of the share would, in a certain proportion, be diminished; but then the share is not taxed at its face value, as representing or standing in the place of the capital stock paid in for it, but only at its market value, thus reduced by the fact that the income which it yields has been rendered less by the tax imposed on the property from which it is derived. If the stock is worth par, then, indeed, it would pay, if the rate of the tax was the same on the capital stock per share as that on the shares, the same sum in the way of taxes; if, however, the shares, as in some cases, were worth double the amount of dollars called for on their face, then it would pay this much more in proportion to its value; but this value would be made up of income, and the increased amount paid would be on the increased

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income paid by the owner. But if, again, the stock, say, was worth in the market only ten cents on the dollar, then the tax on the share would not be the same as that paid on the capital stock, if taxed on the amount paid in.

Without further pursuing this line of argument, it suffices to say that the illustrations we have given show that there are elements of diversity between the capital stock and the shares to sustain the view of Judge TURLEY, that the same are two distinct properties, and though one be exempt by contract, yet the other is liable to be taxed; at any rate, there is nothing in the opposite view, we think, so preponderating as ought to induce us to overrule the opinion referred to. We might cite several cases referred to that seem to accord with this view, but it would extend this opinion, already much longer than is desirable. It suffices to say, that the well-known cases of the National banks, their capital stock being in United States bonds, and exempt from taxation, yet the shares owned by the stockholders being held liable to State taxation, all go on this view of the question, and distinctly announce this theory, whether the cases rest entirely on it or not. As to any supposed danger of the destruction of the value of property or stocks by taxation, we need only say, that it is a property distributed among the people like other property, is not usually aggregated in large masses, or at any rate, at present has not reached that point in our State, and for its protection may be safely left to the sense of justice of the legislature and influence of the constituent on the representative. In addition, under our Constitution it can only be taxed as other property, according to its value. If it should ultimately grow into such large masses in the hands of the capitalists, in the future growth and development of the wealth and resources of the country, as to excite prejudices, no danger need be apprehended, as all history shows that capital has always been able to take care of and protect itself.

We therefore conclude that the shareholders are liable to be taxed for their stock as owners of other property, regardless of the fact that the capital stock invested in the property of the company has been taxed, and has paid the tax.

Judgment will be entered in the cases in pursuance of the views of this opinion, with costs. *Judgment accordingly.*

NOTE BY THE REPORTER.—The cases referred to in the principal case as hostile to its conclusions are, without exception, we believe, cases in which there was an exemption from taxation stipulated for in the charter.

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In *State v. Brannin*, 3 Zabr. 484, it is held that when an incorporated company is by its charter exempt from taxation, the stock of the company in the hands of the stockholders cannot be taxed, as it represents and is the title to the property of the company, and therefore is included in the exemption of its charter; but the stock of incorporated banks, although the bank pays a tax on its capital, may be taxed in the hands of stockholders, if authorized by the legislature, although it is a second tax upon the same property. Double taxation may be unequal, oppressive, and unjust, but it is not prohibited by any constitutional provision, and it is in the discretion of the legislature; and courts cannot declare void a statute within the constitutional power of the legislature, because its operation may appear unjust or oppressive. To the first proposition are cited *Johnson v. Commonwealth*, 7 Dana, 342; *Tax Cases*, 12 G. & Johns. 117; *Gordon's Err's v. Mayor of Baltimore*, 5 Gill, 286; *Smith v. Burley*, 9 N. H. 423. To the latter: *Providence Bank v. Billings*, 4 Pet. 583; *McCullough v. State of Maryland*, 4 Wheat. 316; *Salem Iron Factory v. Danvers*, 10 Mass. 518; *Smith v. Burley*, 9 N. H. 423. The court say on the first point: "The terms of the contract on the part of the State are that no other tax or impost shall be levied or assessed upon the said company. Does this exemption extend to the interest of the individual stockholders in the property of the company? If this were a new question, I should have some difficulty in arriving at the conclusion that the shares of the individual stockholders were, by virtue of the contract, exempt from taxation, on the grounds that by the terms of the contract the exemption is strictly limited to the body corporate; that the property of the individual stockholder is not identical with the property of the corporation, and not within the terms of the exemption; that in a public grant nothing passes by implication, the contract in all cases of doubt being taken most strongly in favor of the public and against the grantee, and especially as the fact of giving such construction operates to limit the taxing power of the State." But the decision is rested upon that in *U. S. v. Appeal Tax Court*, 3 How. 133.

The latter case lays down the same doctrine. The court there said: "Does it exempt the respective capital stocks of the banks, as an aggregate, and the stockholders from being taxed as persons on account of their stock? We think it does both. The aggregate could not be taxed, without its having the same effect upon the parts that a tax upon the parts would have upon the whole. Besides, the legislature, in proposing the terms and conditions of the act, use the word 'banks' with reference to the consent or acceptance of the act being given by the stockholders, according to a fundamental article of their charter. The acceptance of the act could only be made by the stockholders. They did accept, and the State recognized it as the act of the stockholders. It could not have been given or been recognized in any other way. True it is, when accepted and recognized, it became a contract with the banks. But its becoming a contract with the banks determines of itself nothing. We must look in what character or by whose assent it was to become a contract with the State, to ascertain the intention of the legislature in making the pledge, 'that upon any of the aforesaid banks accepting of and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act.'" "The act to be done in this instance was relative to the institution. The legislature knew it could only be done by the stockholders, and it uses the word 'banks' in reference to the act being accepted by the stockholders. The act was accepted by them. When therefore the legislature says, 'that upon any of the aforesaid banks accepting of and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act; the relative is as broad as the antecedent, comprehending all that the latter referred to."

In *Johnson v. Commonwealth*, 7 Dana, 342, a bank was required by its charter to pay to the State a bonus of twenty-five cents per annum on each share of stock, which might be increased to not exceeding fifty cents. This was held a limitation of the taxing power, and an inviolable contract between the stockholders and the State. The court continued: "The power to augment the tax to as much as fifty cents is a power to tax the corporation only; whereby all stockholders, non-resident as well as resident, would be subjected to an equal burthen. There is no power, reserved or resulting, to tax an individual stockholder, though he may reside within this Commonwealth. Such a tax would be unequal, and

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therefore unjust ; and the power to impose it would be inconsistent with the object of the fifteenth section of the charter, which was to secure the stockholders against the consequences of unlimited and capricious taxation of their bank stock."

In *Tax Cases*, 12 Gill & Johns. 117, it was held that the property of a bank being represented by the shares of stock therein, both cannot be taxed, and therefore when the tax is imposed on the stock in the hands of shareholders, the property of the bank cannot also be taxed.

The like was held in *New Haven v. City Bank*, 31 Conn. 103. The court said : " We cannot, in the absence of explicit declarations to that effect, impute to the legislature an intention to provide merely that the shareholders should be individually exempt from taxation on account of their respective interests in the property of the bank, while it retained the power and right to assess and tax all or any portion of that property against the bank itself. Such reservation of right would render the promised exemption a worthless fragment."

The doctrine of the principal case is well adjudged in the case of *State v. Freeman*, and the cases there cited, and has the approval of Burroughs and Cooley in their works on Taxation, although Angell and Ames state the contrary doctrine.

GREENWOOD V. STATE.

(6 Baxt. 597.)

Criminal law—double punishment—ordinance and statute.

Conviction and punishment under a city ordinance for keeping a gaming house is no bar to a prosecution for the same offense by the State.*

CONVICTION of keeping a gaming house. The opinion states the case.

Attorney-General Heiskell, for the State.

L. B. Horrigan, for defendant.

FREEMAN, J. Greenwood and others were indicted in the Criminal Court of Shelby county for keeping a gaming house. The matter of defense set up by the defendant was a former conviction, which was presented in the form of an agreement between the attorney-general and the defendant, and is as follows :

1. That if defendant kept a gaming house, it was within the corporate limits of the city.

2. That the said defendant has been regularly fined and punished by the lawful municipal authorities, or court for the said city, for the said offense of keeping a gaming house mentioned in said indictment.

* To same effect *McBea v. Mayor* (59 Ga. 103), 27 Am. Rep. 320.

The parties add further, that all formalities of pleading are expressly waived, and the question desired to be passed upon by the court is, whether the said defendant, after being fined, convicted and punished by the municipal government, or its proper officials, for the said offense, can be held by the State to answer for the identical offense.

The question presented for our decision is, whether, where a party has been convicted and punished for keeping a gaming house by the municipal authorities of a town or city, this fact is a bar to a prosecution for the same offense by the State.

We may remark, that art. 5 of Amendments to the Constitution of the United States, providing, among other things, that "no person shall be subject for the same offense to be twice put in jeopardy of life or limb," has no application to the States, being only a limitation on the Federal Government. *Barron v. Mayor*, 7 Pet. 243; *Mitchell v. Comm.* 7 Wall. 326, and cases there cited. Our own Constitution, art. 1, § 10, is, that "no person shall for the same offense be twice put in jeopardy of life and limb," the language being identical with that of the Constitution of the United States.

Whether this clause, or the same provision in the Constitution of the United States, applies to offenses the punishment of which does not extend to "life or limb," or to crimes as distinguished from misdemeanors, and was intended originally to give the high sanction of a constitutional guaranty against the repetition of the prosecution only in such cases, we need not decide at present. That this is the literal meaning of the language is pretty clear, and it was certainly understood to apply only to offenses punished by loss of life or limb, by our earlier judges on this bench, as held in the case of *State v. Reynolds*, 4 Hay. 110, decided in 1817. In that case a party had been acquitted of perjury, and it was sought to have the case reviewed in that court by appeal on the part of the State. The court, in referring to the rule of the common law, and enforcing it, that no one could be put in jeopardy twice for the same offense, say that this article of the bill of rights had no application to the question, "for here the punishment does not extend to life or limb." However, as held by the court in that case, it is well settled by the common law that no one could be twice put in jeopardy for the same offense, and so, whether the protection sought is found in the Constitution or in the common law, in this case, it presents the same difficulty in its solution.

In endeavoring to arrive at a proper conclusion on this question, we must remember, according to the idea of Judge COOLEY in the case of *People v. Hurlburt*, 24 Mich. 96, that the Constitution of our State assumes the existence of counties and municipal corporations, the latter having and exercising such powers of local self-government under grants in charters from the legislature as might be necessary for their proper regulation, and the maintenance of the peace, good order and protection of the people thus aggregated in large masses. That the existence of such municipal corporations being assumed and recognized in the Constitution as part of the arrangement contemplated to make up the machinery of the great corporate body, the State, it must be fairly understood that the people or convention contemplated that these corporations should have and exercise all the usual powers proper and necessary for the perpetuation of their existence, and for the due regulation of their peculiar life, so to speak. We therefore conclude, that whatever may have been the usual powers granted or ordinarily held by these corporate bodies at the organization of our government, and whatever powers, necessary and proper to be exercised by them, as an incident to their existence, as part of the machinery of the government of the State, were expected to be continued to them under legislative grants in their charters, and this by the very fact of the clear recognition of the fact that such bodies should exist in the Constitution of our State.

As a matter of history, we know that the organization of municipal corporations was one of the most efficient agencies by which freedom and government by law, rather than strong hand, was introduced and fostered in Europe in the middle ages. Robinson, in his view of the progress of society in Europe, *Introduction to History of Charles V*, p. 19, in referring to the institutions which had tended to secure the liberty and independence of the people, says: "The forming of cities into communities, corporations, or bodies politic, and granting them privileges of municipal jurisdiction, contributed more, perhaps, than any other cause to introduce regular government, police and arts, and diffuse them over Europe," more than any one of the various causes which he enumerates in his essay as contributing to these desirable ends. In enumerating the powers which were thus obtained by these chartered communities, among other important rights, the same author says: "They were recognized as bodies politic to be governed by a council and magis-

trates of their own nomination. These magistrates had the right of administering justice within their own precincts, of levying taxes, of embodying and training to arms the militia of the town, which were officered by men appointed by the municipal authorities. These institutions, originating in this form in Italy in the twelfth century, adopted in France soon after, were in no great length of time transferred to England, the country from whence we derive our jurisprudence. There, it is true, modified in some of their aspects to meet the wants of a great people, and being gradually, to a greater or less extent, subordinated to the general control of the supreme legislative body, the Parliament, yet still maintaining many of their chartered rights as inviolable, and clinging to them as essential to their freedom and even their existence, as one of the subordinate political divisions of the State, they continued up to the time of the separation of the colonies from that country.

In this form we received this institution, and our political fabric has been reared, so to speak, with the municipal corporation as one of its integral elements, forming, as we may readily see, one of the necessary parts of the social and political organization under which we live, without which the government of the State would be incomplete, and utterly fail to attain one of its great ends, the protection and security of person and property in towns and cities, as well as throughout its entire territory.

With this history of these institutions, and in view of the necessity of having such bodies, from the organization of the government down to the present time, acts of incorporation have been granted to our cities and towns, granting them such powers as were deemed proper for the attainment of the ends of their creation. Among the powers so granted are: "To pass such by-laws and ordinances for the removal of nuisances, to define by corporation laws misdemeanors, when committed within their limits, and make such acts offenses against such corporation laws, punished by pecuniary fines and penalties," which shall be collected on a warrant issued by the mayor, recorder or other judicial officer of the corporation, in form of a debt, but in fact for the recovery of a penalty, forfeiture, or a fine; the name, in the language of the court in 1 Head, 74, being immaterial. In such cases, the fine or forfeiture imposed by the corporation ordinances is recovered, on proof that the offense has been committed, which is prohibited by the statute. See the above case.

The case referred to was a warrant for recovery of fifty dollars, in consequence of a forfeiture or penalty, incurred for a misdemeanor for keeping a disorderly house in Chattanooga, contrary to a by-law of said town.

Section 35 of Amended Charter of the city of Memphis provides, among other things, "the general council shall have power to establish a work-house in the county of Shelby, to define by law or ordinance misdemeanors, and when committed within the city limits, to punish the same by pecuniary fines and penalties, and by imprisonment and labor within or without a work-house in default of payment of said fine, to regulate and suppress all disorderly houses and houses of ill-fame, to restrain, prohibit and punish gaming."

It is clear, under this charter, the city had the power to punish or fine the parties in these cases, by way of restraining, prohibiting, or punishing gaming.

It has been held in *Nolin v. Mayor of Franklin*, 4 Yerg. 163, that exhibiting a stud-horse in the streets of a town is a nuisance; and keeping hogs, ale-houses, gaming-houses, brothels, etc.; and in *State v. Shelbyville*, 4 Sneed, 176, that a corporation empowered by its charter to remove nuisances was indictable for failure to remove a slaughter-house for hogs within its limits, as being injurious to the health of the inhabitants.

From the principle of these cases, and from the general principles of the law growing out of the necessities of such incorporated municipalities, it is clear that such offenses as are referred to above, and such as are involved in the present cases, are held and deemed to have in them elements of an offense or misdemeanor against the rights of such corporations, and as such they may be punished by a corporation proceeding with a view of restraining or prohibiting such acts within the limits of such bodies, and that in doing so, it is only the peculiar offense against the corporation that is punished, and not any violation of any State law that may prohibit such acts throughout the entire territory of the State, and inflict such penalties for the violation of this law as may be appropriate in such cases. That the offense of keeping a gaming-house is one that may and does present many elements of criminality in a city or town, by debauching the morals of the youth, presenting temptations to all inclined to yield to them, calculated to lead them into the ways of vice and crime, and that these evil influences are far more active

and powerful in towns and cities than in the country, therefore productive of a wider spread injury, and one specifically affecting the interest and good morals of the incorporated community. will be readily admitted by all. It is therefore highly proper that this aggravated nuisance should be subject to the control of and restraints imposed by the ordinances of these local governments peculiarly affected by the evil.

We therefore conclude, that in view of the facts and necessities of the case, it cannot be understood, that by the common law of any civilized country of the present day, deriving its jurisprudence from English sources the rule forbidding a party to be punished twice for the same offense was intended to include, and to be held to apply to the case of punishment by these corporate authorities for the wrong done them and their peace, security, and morals, so as to be a bar to a prosecution on the part of the State, and infliction of such punishment as she may deem proper to inflict by law upon her citizen. The fact that he is both a citizen of the State and also of a corporation, and is therefore amenable to both jurisdictions for any violation of the law of either, and that each may choose to forbid an act, and inflict a penalty for its violation, ought not, we think, to make any difference. He can readily avoid such inflictions by obedience to the laws of the communities of which he is a member, and if he chooses to defy constituted authority, courts organized not only for the punishment but suppression of crime, as far as they may be able, should feel but little sympathy with such offenders.

Mr. Cooley, in his work on Constitutional Limitations, citing a number of cases, lays down the principle "that the same act may constitute an offense both against the State and the municipal corporation, and both may punish it without violation of any constitutional principle," p. 199. In the case of *Mayor of Mobile v. Allaine*, 14 Ala. 400, cited in a note, we think a correct view of the question is stated: "The object of the power conferred by the charter, say the court, and the purposes of the ordinance itself, was not to punish for an offense against the criminal justice of the country, but to provide a mere police regulation for the enforcement of good order and quiet within the limits of the town. So far as an offense has been committed against the public peace and morals, the corporate authorities have no power to punish. It is immaterial whether the State has punished the party or not, the prosecution

at the suit of each proceeds upon a different hypothesis ; the one contemplates the observance of the peace and good order of the city, the other has a more enlarged object in view, the maintenance of the peace and dignity of the State."

In support of the view we have indicated, that the common law did not intend that punishment by a corporate authority should prevent the action of the State, we find the principle thus stated in a note in Dill. on Mun. Corp. 311: "In England, a by-law imposing a penalty on a corporator for refusing to serve in a corporate office is valid, notwithstanding the party may be indicted for the same refusal, as he may be in all cases of municipal offices necessary or proper to carry on the government of the corporation ;" for which he cites Grant on Corporations, page 82. In the same note it is said, "a distinction was early taken, in England, between grave offenses classified as pleas of the crown, and triable upon an issue of not guilty between the king and the defendant, and lesser or petty offenses punishable by fine or *amercement* upon presentment in court, sect, or inferior jurisdictions." For this is cited 1 Hale's P. C., E. 11; 2 id., ch. 19. We think this presents the true line of distinction, and is the sound rule to be applied in the cases before us, one which may be well designated as the common law of the case — that is a rule of right reason, growing out of the demands of our social and political organization, applied to the particular case in hand.

We do not feel called upon to define what may be included in the general idea of corporation offenses, for like fraud, it would be very difficult to give a definition that would include all the cases that may arise in our present state of society, and still more difficult to give one that would meet all the aspects of future social life that may grow up in our cities, calculated to debauch and deprave the morals of such communities, or give offense to public decency and propriety. We leave the cases to be provided for as they may arise, and the validity of ordinances passed to meet them, to be tested, when the cases are presented, by the general rules of law already established for the purpose, such as that the ordinance must not be oppressive, nor in violation of the general law of the land, and other well-known rules on this subject.

We need not refer to the authorities presented by counsel on this question. Suffice it to say, that in some of them a different conclusion has been reached from what we have arrived at, but we

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think the large preponderance is in favor of the rule we have laid down in this case, though not for the precise same reasons herein given.

The result is, that the judgment of the court below will be affirmed.

Judgment affirmed.

BLOODWORTH V. STATE.

(6 Bart. 614.)

Oriminal law — rape — fictitious marriage.

Sexual connection with a woman of weak intellect by means of a fictitious marriage does not constitute rape.*

CONVICTION of rape. The opinion states the facts.

E. A. Hicks, for complainant.

Attorney-General *Henskell*, for the State.

FREEMAN, J. This is an indictment for rape, alleged to have been committed on Eliza Ann Morris by one Percell, in which the present defendant is alleged to have been present, aiding and abetting and assisting said Percell in the perpetration of the act, and so guilty of the same offense. Bloodworth was convicted, and appeals in error to this court, where several errors are insisted on for reversal of the judgment of said court below.

[Omitting some technical points.]

The next question presented arises on the facts as to the consent of the party alleged to have been the subject of the offense, or rather her incapacity, by reason of imbecility or feebleness of mind, to give such consent, and the law as charged on this question by his honor the Circuit judge.

The proof shows that Percell had procured a man named Cook to personate a minister of the gospel for the purpose of performing a mock ceremony of marriage with Miss Morris. Percell and Cook, together with defendant, went to a place in the woods near the

*See *State v. Atherton*, ante, p. 124.

house of the father of Miss Morris, in the latter part of October, about two hours before sundown. That Percell went to the house, took the daughter, as her mother says, by the arm, and led her off to the woods, the mother following. They went to the place where Cook and defendant were in the woods, and there Cook, representing himself as a minister of the gospel from Clarksville, performed a pretended marriage ceremony, producing at the time a paper purporting to be a marriage license authorizing him to marry the parties. Percell and Eliza Ann Morris, the daughter, then started off to go to Percell's house, about a mile, perhaps, from Morris'. A brother of the girl seems to have gone to the same house that night, stayed all night, and slept in the same room with the parties. Percell slept with the girl that night. No force is shown; on the contrary, it is clear that the girl made no objection, and no doubt willingly, so far as she was capable, yielded to all that was done. It is equally clear, however, that the whole affair was a premeditated and deliberately carried out piece of fraud on the part of Percell and Cook, for the purpose of having sexual intercourse with a feeble-minded, if not imbecile, girl—conduct deserving the utmost reprobation, and well worthy of the infliction of the severest penalty.

It is not so satisfactorily shown that the present defendant had any guilty knowledge of the purposes of the other two parties, and the evidence might well generate a doubt as to whether he was not deceived into believing it to be a piece of sport on the part of the other two, or a *bona fide* marriage. However, the jury seem to have thought differently.

As to the capacity of the girl to consent to what was done, or to refuse or oppose it, owing to mental incapacity, the evidence is meager and not entirely satisfactory. The only evidence bearing on the question directly is that of Dr. Menees, who says that he had been a practicing physician for seventeen years, and had visited the family of Morris at intervals during that period, and had waited on Eliza Ann when she was sick. He states that "she was a woman of very weak mind, and almost an idiot." He gave it as his opinion that she had enough mind to consent to have intercourse with a man, but that he thought she did not have mind enough to know what that consent was, etc. This is, as we have said, very unsatisfactory evidence as to the capacity of the party, and from it we could hardly be justified in concluding that she was an idiot,

wholly incapable of assenting to the act complained of ; nor could a court or jury well be called on to say with precisely how much intelligent comprehension of the nature and consequence of an act a party under such circumstances must have acted in order to make out the element of this offense, given in the statute, of its being forcible and "*against* her will."

Without further referring to the testimony, however, it suffices to say, that it clearly appears that this is a case of intercourse had with a very weak-minded woman, where her yielding to the wish of the party was obtained by gross fraud. And further, the jury have found—as they were bound, under the charge of his honor, in order to conviction—that the woman was of such weak mind as to be incapable of giving her consent ; or, to use his language, "was an idiot or lunatic, or of such feeble intellect as not to be capable of exercising a rational will, or of giving or withholding her consent." And the question is, as to whether intercourse had with a woman without force, under such circumstances, is or may be a rape under our laws. In the language of Judge CARUTHERS, in the case of *Wyatt v. State*, 2 Swan, 396, "We agree with the attorney-general, that the moral turpitude of the crime is as great when perpetrated by fraud and deception, as by force," and that the act richly deserves to be severely punished ; but the question is, not what it deserves, nor what our feelings and individual opinions would dictate, but "what sayeth the law." It was settled in that case, that the language of our statute defining rape to be "the unlawful carnal knowledge of a woman *forcibly* and *against* her will," necessarily included *force* as an essential element of the crime, and that to attain the result by fraudulently obtaining consent to the act, would not make out the offense. This case was decided upon a very full reference to the authorities, and we are aware there are several most respectable authorities holding the opposite view, we feel bound to follow our own decisions. The statute, in fact, hardly admits, with any degree of fairness, a different construction ; for, to say that a thing is done *forcibly* and *against* the will of a party, is not sustained by showing that no force was used, but that fraud and deceit had been used instead of force. In fact, the idea of attaining an end by the use of fraud necessarily excludes the idea of force, and is antagonistic to it. As to the want of competent capacity to give or withhold consent, while this may and does exclude the idea of consent, affirmatively, yet it does not necessarily or fairly include or involve

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the idea of the language of the statute, that it was done *against* her will. The principle of the case of *Wyatt v. State*, however, we deem conclusive of this aspect of the question; for in case of fraud, where a woman yields to sexual intercourse with a man supposing him to be her husband, and is thus outraged in fact by fraud, she gives no intelligent assent to what is done, and she as much withholds her assent to the act done, if the case was apprehended by her, as the imbecile, and even would revolt from it; yet in such a case, under the rule laid down, there would be no rape. We therefore feel constrained to hold, that the element of force being entirely excluded by the proof in the case, and the fact of some degree of assent shown, and certainly no dissent, the act could not have been both forcible and against her will, and these elements are by our statute made essentials in this crime.

The legislature, with their attention called to this case, can, and no doubt will, easily enact a law that will meet the precise case. We have no power to do it, and can only administer the law as we find it.

There are perhaps several other errors in admission of testimony and it may be, in the charge of his honor, but we do not deem it necessary to notice them, as what we have said is conclusive of the case.

Reverse the case and remand for a new trial.

Judgment reversea.

STATE V. BELL.

(7 Baxt. 12.)

Criminal law — marriage — miscegenation.

A white man and a colored woman, married according to the forms of law in Mississippi, may be indicted for living together as husband and wife, under the statute of Tennessee.*

INDICTMENT of a white man for living with a colored woman, as his wife. The opinion states the case. The defendant had judgment below.

Jno. A. Campbell, for defendant.

*See *Fraser v. State* (3 Tex. Ct. App. 263), 30 Am. Rep. 181; *Kinney v. Commonwealth*, post.

Attorney-General Heiskell, for the State.

TURNEY, J. The motion of the defendant to quash was allowed because it appeared upon the face of the indictment the parties were married in the State of Mississippi.

The question to be determined is, does a marriage in Mississippi protect persons who live together in this State in violation of the act of the general assembly of the 27th of June, 1870?

For the defendant, the case of *Morgan v. McGhee*, 5 Humph. 13, is relied on. That case only decides that marriages solemnized according to the law and usages of the country where made are good in Tennessee. It is the manner and form of marriage, and not the capacity of the parties to contract the marriage, which was passed upon by the court delivering the opinion. The reason for such rule is readily seen. Each State has its peculiar regulation—some more, some less strict and formal. The general rule resulting from all—that a marriage good in the place where made after the forms and usages of that place, shall be good everywhere—is intended to prevent a mischief that would otherwise grow out of a difference of formal and local regulations. For instance, in some of the States a license is not absolutely necessary. Now, if in one of such States a marriage is solemnized without license, being good there, it is good in Tennessee, where a license is necessary, and where a marriage and living together without license would subject the parties to indictment for lewdness.

A respect for and recognition by each State—in fact, nation—of the legal ceremonial of marriage in another, is all that is meant or intended by the rule. All standard authors declare the rule comes, not *ex comitate*, but *ex debito justitiæ*. Were it otherwise, each State would be dependent upon the concurring legislation and adjudication of every other for the permanency and efficacy of its own.

Each State is sovereign, a government within, of, and for itself, with the inherent and reserved right to declare and maintain its own political economy for the good of its citizens, and cannot be subjected to the recognition of a fact or act contravening its public policy and against good morals, as lawful, because it was made or existed in a State having no prohibition against it or even permitting it.

Extending the rule to the width asked for by the defendant, and

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we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a State or country where they were not prohibited. The Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol, and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.

Chancellor KENT says the contract of marriage is a stable and sound contract, of natural as well as municipal law. This is neither.

Reverse the judgment and remand the cause for a new trial.

Judgment reversed.

STATE v. WILBURN.

(7 Baxt. 57.)

Criminal law — concealed weapons — constitutionality — indictment.

A law prohibiting the carrying of an army pistol except in the hand is constitutional.*

An indictment charging the carrying of an army pistol privately and concealed, and not openly in the hands, is not bad for omitting the statutory words, "about his person."

INDICTMENT for illegally carrying weapons. The opinion states the case. The defendant had judgment below.

Attorney-General Heiskell, for the State.

No brief for defendant.

NICHOLSON, C. J. Wilburn was indicted in the Circuit Court of Wilson county for carrying weapons contrary to law. The first count charges him with carrying a belt and pocket pistol and revolver pistol, the same being an arm such as is not commonly carried and used in the United States army. The second count charges that he "did unlawfully and willfully carry an army pis-

* See *Fife v. State* (31 Ark. 455), 25 Am. Rep. 556, and note, 561. To the same effect, *Barlow v. State*, 7 Baxt. 105; *Porter v. State*, id. 106.

tol privately and concealed, and not openly in his hands," etc. On motion the second count was quashed. A trial was had on the first count, and defendant was acquitted. The State appealed from the judgment quashing the second count.

The record furnishes us no information as to the ground on which the second count was quashed, nor have we been furnished by the counsel for defendant with any argument in support of the action of the court. We presume, however, that the Circuit judge must either have held that the offense charged is not indicated, or that it is not sufficiently described under the law.

By section 26 of the Declaration of Rights, article 1 of the Constitution of 1870, "the citizens of this State have a right to keep and bear arms for their common defense; but the legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime."

The first act passed after the adoption of the Constitution of 1870 was as follows: "It shall not be lawful for any person to publicly or privately carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver." But this act was not to apply to an officer or policeman engaged in his official duties, or to any person *bona fide* aiding an officer, or to any person on a journey out of his county or State. It is observed that the prohibition is against the carrying, publicly or privately, the weapons enumerated. In conferring the power to "regulate," etc., the words employed in the Constitution are "wearing of arms." It was held by this court, in the case of *Page v. State*, 3 Heisk. 198, that the legislature used the word "carry" in this act as synonymous with the word "wear," as applied to arms; and that the expressions "wearing arms," "carrying arms" and "going armed" had the same meaning. Hence, that a person was indicted for carrying a pistol, not an army weapon, along the road in his hand, if his intent in so carrying was that of "going armed." The power of the legislature to make the carrying of weapons, not adapted to the common defense, unlawful, admits of no controversy. This power existed before as well as since the adoption of the Constitution of 1870. None of the weapons enumerated in the act of 1870 fall under the denomination of arms for the common defense, except it may be the "revolver." This term is sometimes applied to a pistol not recognized as an army weapon, and sometimes to the well-known army weapon usually called a "repeater." Hence this court, in the case

of *Andrews v. State*, 3 Heisk. 165, held that the carrying of all the weapons enumerated in the act of 1870 was constitutionally declared unlawful by that act, including the revolver. When it should appear by the proof that it was properly an army weapon, then it was held that the prohibition of the statute was too broad, as in effect it is an absolute prohibition against keeping such a weapon, and not a regulation of the use of it. In this respect the act was regarded as violating the constitutional right to keep arms. But the court further held that the legislature might, "by a proper law, regulate the carrying of this weapon publicly and abroad, in such a manner as may be deemed most conducive to the public peace, and the protection and safety of the community from lawless violence." It was not intended by this declaration to hold that the power of the legislature was restricted to the enactment of proper laws for "carrying this weapon publicly or abroad." On the contrary, it is fairly to be inferred from the reasoning in the opinion that the power of the legislature to regulate the carrying or wearing of the army pistol, privately or publicly, was conceded, except that a doubt was indicated as to whether the legislature could constitutionally prohibit such wearing or carrying of this weapon, when it was clearly shown it was worn *bona fide* to ward off or meet imminent and threatened danger to life or limb, or great bodily harm. But this question was not decided, but reserved until it should properly arise.

After the decisions of the cases of *Andrews v. State* and *Page v. State*, before referred to, the legislature passed the act of 1871, ch. 90, under which the defendant in the present case was indicted. The title of the act is, "to preserve the peace and to prevent homicide." It enacts, "that it shall not be lawful for any person to publicly or privately carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol, or revolver, other than an army pistol, or such as are commonly carried and used in the United States army, and in no case shall it be lawful for any person to carry such army pistol publicly or privately about his person in any other manner than openly in his hands," etc. The same exceptions as to officers, policemen, and persons on a journey, are then made, as in the act of 1870.

It is observed that the acts of 1870 and of 1871 are the same, so far as the prohibition of carrying the weapons enumerated, and so far as the exceptions in favor of officers and travellers are concerned ;

but the difference in the provision as to the carrying of the army pistol was therefore manifestly intended to remedy the defect held to exist in the act of 1870, by the decision of this court. In other words, it was intended to regulate the wearing of the army pistol, by prohibiting its wearing or carrying publicly or privately about the person, in any other manner than openly in the hands. It was not an absolute prohibition of the carrying or wearing of this weapon, as it recognizes the right to carry it openly in the hands, and it concedes to public officers and travellers the right to carry or wear the army pistol, or any of the other weapons enumerated in the act, under the circumstances specified in the act.

We are not called upon, in the present case, to determine what the legislature meant by the "carrying of the army pistol openly in the hands," or why such an exception was made. The only questions now before us are, first, whether the act of 1871, prohibiting the carrying of an army pistol about the person publicly or privately, is authorized by the clause in the Constitution which empowers the legislature, by law, to regulate the wearing of arms, with a view to prevent crime. As already indicated, we have no doubt on this question, and hold the act to be clearly constitutional. The Constitution of 1834 contained only the provision securing to the citizen "the right to keep or bear arms for the common defense." The additional clause in the Constitution of 1870 was adopted to remove all doubt as to the power of the legislature to regulate the use of the arms which the citizens had a right to keep. It was not intended that the keeping or using of such arms should be prohibited, but that the use thereof by wearing or carrying about the person might be so regulated by law as to prevent crime. It was crime resulting from the habit of wearing arms, or of going armed, which the convention sought to prevent, by expressly conferring this power of the legislature. The legislature has deemed it a proper prevention of crime to regulate the use of this arm by prohibiting the wearing of it or carrying it about the person, privately or publicly, unless it be carried openly in the hands, or unless it be worn or carried by an officer or policeman engaged in his duties, or by a traveller on a journey. This was a legitimate exercise of the power to regulate the wearing of the weapon, and is authorized by the Constitution, and does not interfere with the right of keeping the arm, or of bearing it for the common defense.

The second question is, whether the offense, under this act, is

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sufficiently described in the indictment to warrant a conviction. The charge in the indictment is, that the defendant "unlawfully and willfully did carry an army pistol privately and concealed and not openly in his hands." The offense described in the act is that of carrying an army pistol publicly or privately about his person in any other manner than openly in his hands. It thus appears that the words "about his person" are omitted in the indictment. It is not easy to conceive of a plausible excuse for the omission of these words by the draftsman of the indictment, but we are of opinion that it is not fatal to its sufficiency. It is made our duty by the 4th section of the act of 1870, which is not repealed by the act of 1871, to give to this act a liberal construction so as to carry out its true intent and meaning. We held in the case of *Page v. State*, 3 Heisk. 200, that in the statute of 1870, which, as to the use of the word "carry," is the same as the statute of 1871, the legislature used the word "carry" in the sense of "wear." Such is the sense of the word in the statute of 1871, and the meaning of the legislature was, that the wearing of an army pistol privately was unlawful, which is equivalent in meaning to the carrying of such pistol privately and concealed about the person. We are therefore of opinion that the offense is charged with sufficient certainty in the indictment to authorize a conviction if the same should be sustained by proof on a trial.

The judgment is reversed and the cause remanded.

Judgment reversed.

STATE V. LORRY.

(7 Baxt. 95.).

Criminal law — nuisance — keeping open barber shop on Sunday.

Keeping open a barber shop on Sunday is not an indictable nuisance.
(See note, p. 557.)

INDICTMENT for keeping open a barber shop on Sunday. The opinion states the case. The defendant had judgment below.

Attorney-General Heiskell, for the State.

G. P. M. Turner, for defendant.

NICHOLSON, C. J. Lorry was indicted in the Criminal Court at Memphis for keeping open his shop and carrying on his business of barbering on Sunday, openly and publicly, to the evil example of all others, to the common nuisance of all good citizens, and against the peace and dignity of the State. On motion the indictment was quashed, and the State has appealed.

It is provided by section 1723 of the Code, that if any merchant or other person shall be guilty of doing or exercising any of the common avocations of life, acts of real necessity or charity excepted, on Sunday, he shall, on conviction before a justice of the peace, forfeit and pay three dollars, one-half to the person suing for the same, and the other half for the use of the county.

By section 4596 of the Code, "when the performance of any act is prohibited by statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor."

It follows that although defendant is prohibited from following his avocation of barbering on Sunday, yet as the statute fixes a penalty for such violation, his violation of the prohibitory law is not indictable as a misdemeanor.

But it is observed that the indictment concludes by charging defendant with carrying on his business of barbering openly and publicly to the common nuisance of all good citizens. The question then is, whether the defendant is indictable for a public nuisance in carrying on his trade on Sunday. If this be so, then every other person who carries on his ordinary business openly and publicly on Sunday may be indicted for a nuisance. The occupation of the barber stands on the same platform with that of the merchant, mechanic, farmer, or professional man. It is an occupation necessary for the comfort and convenience of the citizens, and in no respect a nuisance, unless it becomes so by the simple fact that it is carried on on Sunday.

The legal definition of a nuisance is, "that which incommodes or annoys; something which produces inconvenience or damage." It cannot be said that a barber's shop is something which incommodes or annoys, or which produces inconvenience or damage to others. On the contrary, the business of barbering is so essential to the comfort and convenience of the inhabitants of a town or city, that it may be regarded as a necessary occupation. To hold that it becomes a nuisance when carried on on Sunday is a perversion of the term "nuisance." All that can be said of it is, that when

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prosecuted on Sunday it is a violation of the statute, and subject to be proceeded against as prescribed by law, but not subject to be indicted as a nuisance. It may shock the moral sense of a portion of the community to see the barber carrying on his business, with open doors, on Sunday, but it produces no inconvenience or damage to others, and therefore cannot be regarded in legal contemplation as a nuisance.

We are therefore of opinion that the ruling of the court below was correct, and affirm the judgment.

Judgment affirmed.

NOTE BY THE REPORTER — See *Wulkinson v. State*, 59 Ind. 416; 26 Am. Rep. 84, and references; also, *Sutton v. Waunakee*, 29 Wis. 21; 9 Am. Rep. 534; *Frost v. Plumb*, 40 Conn. 111; 16 Am. Rep. 18; *Myers v. Meinrath*, 101 Mass. 366; 3 Am. Rep. 368, and note, 371.

The legality of keeping open a barber shop on Sunday was considered in *Commonwealth v. Jacobus*, 1 Penn. Leg. Gaz. Rep. 491, where it was held that the business of a barber in shaving his customers on Sunday morning is "worldly employment," not "a work of necessity or charity." The court said: "It is argued that as the law does not forbid a person to wash and shave himself on Sunday, and thus to prepare himself to attend public worship, or otherwise properly to enjoy the rest and recuperation which it was the purpose of the day to give, therefore another may do it for him without incurring the condemnation of the law. This view is not sustained by the authorities." "It is further contended by the counsel for the defendant, that long-continued usage and customs of society prove that the business of a barber is by common consent considered a necessity within the meaning of the law. And the forcible and exhaustive arguments of LOWRIE, C. J., in *Commonwealth v. Nesbit*, 10 Casey, 398, are urged upon our consideration as decisive of this case. In my judgment the points ruled in that case and those to be decided here are in no way alike. There it was held that a hired servant, without violation of the act of 1794, might drive his employer's family to church on Sunday in the employer's private carriage, while here the defendant claims that he may lawfully keep open a private shop on Sunday, shaving and dressing the hair of whom may come, whether his customers intend to go to church or not, and whether he is entirely able to shave himself or not. In that, without regard to the necessity of the particular acts done, he claims the right to exercise his 'ordinary calling' on Sunday as on other days." "But is it a work of necessity? Many persons shave themselves on that day, who are shaved by a barber on other days of the week. And not one in ten who shave on that day employs the services of a barber." The court cite *Phillips v. Innes*, 4 Clark & F. 234, with approval. They also say that the defendant's custom of closing his shop at 10 o'clock on Sunday mornings made no difference, and conclude: "If the closing of these shops on Sunday is an inconvenience to the public, the remedy rests with the legislature, and not with the court."

In the latter case, A. D. 1837, an apprentice to a barber in Scotland, bound by his indentures 'not to absent himself from his master's business on holiday or week day, late hours or early, without leave,' went away on Sundays without leave and without shaving his master's customers. Held, by the Lords, that he could not lawfully be required to attend his master's shop on Sundays, for the purpose of shaving the customers, that work, and all other sorts of handicraft being illegal, in England as well as Scotland, not being works of necessity, mercy or charity. Lord Chancellor COTTENHAM said, "this is a case of great importance," and that the work "is one of mere convenience." Lord WYNFORD concurred, saying, "it was not necessary that people should be shaved on Sunday in a public shop; it was not an act of mercy, it was clearly an act of handicraft." Lord BROCKHAM also concurred, saying: "The object of the respondent was gain; and he whose object was gain did not come within the exception. The necessity contemplated by the exception in the statute was the necessity of the person who worked, and

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not of him who compelled the work. It was said in the court below, that unless working persons, who do not themselves shave their beards, were allowed to resort to the barbers' shops on Sundays, many decently disposed men would be prevented from frequenting places of worship, and from associating with their families or friends, from want of personal cleanliness. But why should they not do the work on Saturday as the people did in Glasgow, and in other towns where no sort of work was allowed to be done on the Sunday? It might as well be said that because a person could not decently resort to church, or associate with his family, unless he was decently clothed and fed, therefore the butchers' and the bakers' shops should be kept open on Sunday morning for the convenience of such persons. That was not the practice; the parties took good care to provide themselves on the Saturdays with food and clothing."

In a late number of the *Scottish Law Magazine and Sheriff Court Reporter*, we note the case of *Leslie v. Mackie*, in the Aberdeen and Kincardine Small Debt Court. The court said: "The action is for recovery of wages, the pursuer alleging that he was wrongously dismissed. The defender is a doctor practicing in a country district, and he engaged the pursuer, who is a lad between sixteen and seventeen years of age, as his groom, and to give assistance about the house and on a small farm which the defendant occupies. On a recent Saturday night, about nine o'clock, the defender returned home in a gig which had been lent to him by a friend while his own was being repaired. He ordered the pursuer to have a supply of water at hand for the purpose of washing the gig next morning, the defender having received a message requiring him to use his gig on a professional errand at an early hour the following day. The pursuer stated distinctly that he would not wash the gig on Sunday, and he did not do so. On the Monday he repeated the expression of his determination not to clean the gig on Sundays; and on the defender explaining to him that he considered such refusal an act of insubordination, and incompatible with the relation of master and servant, the pursuer left his service. On the following day he returned with his father, and they both reiterated their determination that the lad should not clean the gig on Sundays. The refusal was put quite distinctly, on the ground that no work could lawfully be done, or ordered to be done, on a Sunday unless it was work of necessity or mercy, and that the cleaning of a gig came under neither category. The only other fact in the case which requires to be noticed is that the pursuer says, and I see no reason for disbelieving him, that he offered to clean the gig upon Saturday night, but that the defender forbade this, on the ground that the operation could not be properly performed by lamplight, and apparently, on the broad account that he, and not the boy, was to be the judge of the time when the gig was to be cleaned. These being the facts, the question to be determined is whether the defender's order to his servant to clean his gig on a Sunday was justifiable or not; and that is a question which, when one considers on the one hand the existing law on the subject, and on the other hand the prevalent usages and opinions of society, is not altogether easy to settle." "A general contract to serve cannot be considered as binding a party to serve on a Sunday, and is illegal unless the work comes within the description of necessity and mercy. I suppose that this doctrine is tacitly acknowledged in all cases of Sunday work, such as those on railways, in blast furnaces, newspaper offices, the post-office, etc., 'necessity' being construed as a relative term, and more or less synonymous with that which is required for the comfort and convenience of the majority of the population. But none the less is it the law of Scotland that handwork which is not done of necessity nor for mercy's sake is when done on Sunday a breach of the law. A distinction has, however, been drawn, and it does not seem to me to be altogether a fanciful one, between the case of a workman ordered to work at his craft or to serve in a shop for the sake of making gain to his master, and the case of a domestic servant ordered to perform an ordinary menial office *intra parietes* of a private house of which the public has no concern, and which is only for the master's convenience, and is incidental to the necessary domestic work and household arrangements. It is further essential to bear in mind that in determining what is work of necessity in a domestic establishment a great deal must be left to the discretion of the master. Life would be intolerable in a house in which the servants were to refuse to do a certain piece of ordinary work on a Sunday which their employer thought necessary, on the ground that they were of a different opinion. The Sunday work which a master may insist upon having done must be reasonably incidental to work which is necessary. For example, I should hesitate to

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hold that a master was entitled to insist that Sunday should be the weekly washing day or the day on which the silver plate not in daily use was to have its periodical scrubbing. On the other hand, a servant would be bound to see that such things as are in use at every meal are properly cleaned, even although that involve the operation of cleaning being done between the first Sunday meal and the second. In the present case it may be assumed to have been a work both of necessity and mercy which led the defender to take out his gig on the Sunday morning. Plainly, the pursuer was bound to give him necessary assistance in doing so, and I am of opinion that it would be straining the law much too far to hold that the master was not justified in having his gig made clean and decent for his journey. The main difficulty I have in the case arises from the fact that the pursuer seems to have been willing to clean the gig on the Saturday night, so as to obviate the necessity for Sunday work, but with reference to this, the principle which I have above alluded to comes in. The master must be the ultimate judge in such a matter. It is inherent in the relation of master and servant that the will and opinions of the one must yield to those of the other, except when the order is plainly illegal."

The cases of *Commonwealth v. Johnston* and *Commonwealth v. Nesbit*, cited in the *Jacobus* case, have pertinency on this subject of service.

In *Johnston v. Commonwealth*, 23 Penn. St. 102, it was held A. D. 1853, that driving an omnibus daily as a public conveyance is a worldly employment, and not a work of necessity or charity, and therefore unlawful on Sunday, and the driver was indictable, although the omnibus was used by persons attending church. This was put on the ground that the act was one for gain and convenience. The court remarked: "If an invalid, or a person immured for six days within the close walls of a city, requires a ride into the country as a means of recuperation, which is the true idea of rest, there is nothing in the act of 1794 to forbid the employment of a driver, horses, and carriages on Sunday to accomplish it. Equally lawful is the employment of the same means to go to the church of one's choice, or to visit the grave of the loved and lost to pay the tribute of a tear. In a very high sense, and perfectly compatible with the statute, these are works of necessity and charity, and had this defendant shown that he was employed for these purposes, and that he was merely engaged in accomplishing them, he ought not to have been convicted. But such was not the case. He was not engaged in executing a special undertaking for either of these innocent purposes, but in performing a contract by the month for the driving a public conveyance. The labor for which he contracted was to be exactly the same on Sundays as on other days of the week. Some would no doubt avail themselves of the omnibus to ride for health and strength, to visit the cemetery, and to go to church, not only on Sunday, but on other days of the week; but he was, notwithstanding, a common carrier, pursuing his ordinary occupation, which was a worldly employment as truly as merchandise is. The motives of an occasional customer do not determine the character of a man's business. Its character is acquired from its general aspects, and from the intention of the person prosecuting it, rather than from those of the person patronizing it."

In *Commonwealth v. Nesbit*, 34 Penn. St. 393, the holding was that a hired domestic servant might lawfully drive his employer's family to church in the employer's private conveyance on Sunday. The court say: "Is this an unlawful act? No member of this court has any doubt or hesitation in saying that it is not. No man, having a reasonable respect for the ordinary customs and usages of the country, could ever originate a doubt about it. Since the settlement of the country we have had substantially the same law on this subject; and under it this sort of act has always been deemed lawful, as is shown by the fact that it has always been practiced, and that its lawfulness has never been questioned. And surely, the uniform practical interpretation of a law for near two centuries is an argument that is worth more than hours of refined criticism and analysis of its phraseology. It is the expression of the common sense of the country, and therefore the argument which common sense most readily appreciates." Among the occupations which may lawfully be pursued for hire on Sunday, the court mention those of the preacher, the religious teacher, the sexton, the organist, the singers, the physician, the apothecary, the livery-stable keeper, the manufacturer of iron and glass, the undertaker, the grave-digger, the driver of a hearse or funeral carriage, and household domestic servants. The law "has never been regarded as applying to the proper internal economy of the family. It does

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not except the ordinary employment of making fires and beds, cleaning up chambers and fire-places, washing dishes, feeding cattle, and harnessing horses for going to church, because these were never regarded as the worldly business of the family, and therefore not forbidden to the head of the family, or to any of the domestics." "Law does not and cannot direct the division and apportionment of labor among the members of the family." Our law has always considered a man's home too sacred to be subjected to such espionage.

In *Carver v. State*, Indiana Supreme Court, March, 1880, appellant was convicted of desecrating the Sabbath by following his usual avocation on that day. The evidence showed that the defendant was a clerk and book-keeper in a hotel, which kept a cigar stand usually attended by another person, in the absence of whom the defendant occasionally sold cigars to the guests of the hotel. On this occasion, such person being absent defendant sold the cigars for which he was indicted. *Held*, that the facts do not constitute the offense charged in the indictment. There is a daily necessity for putting a house in order, cooking meals, drinking coffee or tea, smoking a cigar by those who have acquired the habit, or continuing any other lawful habit on Sunday, the same as there is on a week day, and whatever is necessary and proper to do on Sunday to supply this constant daily need is a work of necessity within the meaning of the law. It is not unlawful to keep a hotel on Sunday in the same way that it is usually kept on a week day, and if a hotel keeps a cigar stand, which is a part of its establishment, from which it sells cigars to its guests, boarders and customers on a week day, to sell cigars from the same stand in the same way on Sunday is not unlawful. There is no difference legally between the act of selling a cigar under such circumstances and the act of furnishing a cup of tea or coffee, a meal of victuals, or supplying any other daily want to a customer, on Sunday, for pay.

In *Crossman v. Lynn*, 121 Mass. 301, it was held that if a maidservant, without any fault on her part, is prevented from returning from her mother's house to her employer's on Saturday night, her employer is justified in using his horse and carriage to bring her to his house on the morning of the Lord's day, that she may prepare needful food for his family, and may maintain an action against a town for an injury to his horse, caused by a defect in the highway, while so travelling.

In *Allen v. Duffy*, Michigan Supreme Court, Feb. 11, 1880, 21 Alb. L. J. 238, it was held that an agreement to contribute toward the purchase of a house of worship is a work of charity, and is not void if made on Sunday, under a statute forbidding "any manner of labor, business or work, except only works of necessity and charity," on that day. The court said: "We have not overlooked the fact that in *Callett v. The Trustees, etc.*, 48 Ind. 365 (see 30 Am. Rep. 197), it was assumed by the Supreme Court of Indiana that such a promise was illegal. The report of the case does not show that the illegality was contested, and the case seems to have turned on a question of ratification. A point thus assumed without consideration is, of course, not decided."

In *Smith v. Schooner "J. C. King"*, U. S. District Court, 10 Pitts. Leg. Jour. 274, it was held that a seaman upon a schooner in the harbor of Frankfort, Michigan, where she was towed to receive a cargo of lumber, cannot refuse to work on Sunday in loading the schooner where the towing vessel is not able to enter the harbor by reason of an insufficiency of water, but is lying outside in the lake awaiting the schooner and is in a place of danger. Where the master of the schooner was of opinion that it was necessary for the safety of the towing vessel that the loading of the schooner (begun on Friday) should be completed on Sunday, and ordered the work to be done, it was the duty of the crew to obey, and a seaman refusing to work on Sunday was rightly expelled from the schooner and forfeited his wages for his disobedience. The court said: "I am satisfied from all the evidence, that with reference to the situation of the Davidson, there was reasonable necessity for the Sunday labor which the libellant was called upon to perform. It was, however, for the master of the King, under the then existing circumstances, to determine whether the work of loading the schooner was necessary for the safety of the Davidson, and obedience to his orders was the plain duty of the libellant. It was not for him to set up his judgment against that of the master. That it was Sunday was no excuse for his refusal to perform the duty required of him (*The Richard Matt*, 1 Biss. 440), and I am of opinion that the master of the King had a clear right to discharge the libellant for his disobedience. Had these four rebellious seamen been permitted to remain on board, their spirit of insubordination might have infected the rest of the crew."

WOOD V. TIPTON COUNTY.

(7 Baxt. 118.)

Municipal corporation — county — failure to repair bridge.

In the absence of statute a county is not liable for damage by failure to repair its public bridges.*

ACTION of damages for failure to repair bridge. The opinion states the case. The defendant had judgment below.

Bate & Smithal, for complainant.

No counsel for defendant.

NICHOLSON, C. J. Wood sued the county of Tipton in the Circuit Court thereof for failing to keep a bridge in repair, whereby a mule of plaintiff's was damaged. Defendant demurred to the declaration upon the ground that Tipton county is not such a corporation as can be made liable by law for damages for injuries caused by reason of a public bridge being out of repair.

The demurrer was sustained and the suit dismissed. Plaintiff has appealed.

The power of county courts over roads, bridges, etc., is a prerogative of sovereignty delegated by the Constitution to the county court. Each county is declared by statute to be a corporation, and the justices of the county court are the representatives of the county, and authorized to act for it. The county court, within the powers prescribed by the Constitution and laws, is the legislature for the people of the county, and bears a relation to the people of the county analogous to that which the general assembly bears to the people of the State. Within their prescribed sphere the counties legislate for the public good in respect to ordering the laying out of roads, building bridges, and such other local improvements as are for the public benefit and authorized by law. They are no more liable to be sued for neglect of the duty of their officers than is the State for similar neglect of duty by its officers. The common law gives no such action, and it is therefore not sustainable at all, unless given by the statute. *Cooley's Const. Lim.* 247.

*To same effect, *Brabham v. Supervisors of Hinds County* (54 Miss. 363), 28 Am. Rep. 352.
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We have no statute subjecting counties to suits for damages arising from neglect of the county officers. The county is declared a corporation to facilitate the execution of the powers delegated to it as a local legislature, and to enable it to make binding contracts, and to be liable to suit for just claims arising under such contracts. But this is the extent to which, as corporations, counties can be sued.

There is no error in the judgment of the court below, and the same is affirmed.

Judgment affirmed.

WYNNE V. ALLEN.

(7 Baxt. 212.)

Guaranty — false recommendation.

If one represents as true that which he knows to be false, in such a way and under such circumstances as to induce a reasonable man to believe that it is true, and it is meant to be acted on, and the person to whom the representation has been made, believing it to be true, acts upon the faith of it, and by so acting sustains damage, such representation is fraudulent, and will sustain an action by the party damaged.*

ACTION for fraudulent representations. The opinion states the case. The defendant had judgment below.

DEADERICK, J. This is an action to recover damages for the false and fraudulent representations contained in a letter written by defendant, whereby plaintiffs were induced to give credit for goods sold to W. K. Bennett, who was insolvent.

The cause was tried in the Circuit Court of Haywood county, and resulted in a verdict and judgment for defendant, from which plaintiffs have appealed in error to this court.

In the spring of 1869, W. K. Bennett, who was then a partner in the mercantile business with Geo. W. Bennett and W. B. Mann, sold his interest to Mann, Mann taking all the assets and assuming all the liabilities of the firm.

In the fall of 1869, W. K. Bennett, desiring to resume business, went to Cincinnati and contracted for goods of several merchants,

*To same effect, *Einstein v. Marshall* (58 Ala. 155), 29 Am. Rep. 129.

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but they, hearing he was involved in liabilities to Philadelphia merchants, as a member of the late firm of Mann, Bennett & Co., refused to deliver the goods contracted to be sold until satisfied upon this point.

W. K. Bennett returned to Brownsville, and procured from defendant the following letter, whereupon the goods were delivered to him.

“BROWNSVILLE, TENN., Oct. 26, 1860.

Messrs. DUNCAN, FORD & ELDER:

Gents — I learn from Major Bennett that there have been some rumors put in circulation concerning the indebtedness of the late firm of Mann, Bennett & Co. I can say that I have all the claims of which I have any knowledge against said firm for collection, and all of which have been satisfactorily adjusted, and the major is not involved in the matter, the other part of the old firm having assumed the liabilities.

Respectfully, etc.,

W. A. ALLEN.

P. S.— The claims of which I have spoken were from Philadelphia, and amounted to about seven thousand dollars.

Respectfully,

W. A. ALLEN.”

At the time this letter was written, it appears that W. K. Bennett was still liable for the partnership debts of Mann, Bennett & Co., and that judgment had been taken against the firm, including W. K. Bennett, for about six thousand dollars on those Philadelphia debts.

Some time after W. K. Bennett received his goods from Cincinnati, and after he had sold about one-third of them, having failed to pay plaintiffs any thing, they sent an agent to collect or secure their debt, and while he was negotiating for that object, executions were issued upon these judgments and levied upon his goods. The control of these claims having passed in some way from Allen to other lawyers, the goods were sold, and plaintiffs lost their debt for the goods, sold, as they allege, upon the faith of defendant's letter.

The question for determination is, whether the instructions of the court to the jury were correct.

In the leading case of *Pasley v. Freeman*, 3 T. R. 51; 2 Smith's

Lead. Cas. 157, it is held, that "a false affirmation made by defendant with intent to defraud the plaintiff, whereby plaintiff receives damage, is the ground of an action upon the case in the nature of deceit," and it is not necessary that defendant should be benefited by the deceit, or that he should collude with the person who is."

In the subsequent case of *Eyre v. Dunsford*, 1 East, 318, where the plaintiffs applied to defendant to know the character of Thompson, who was proposing to buy £1,000 worth of goods of plaintiff, defendant replied, "we have a credit lodged with us, by a very respectable house at Hamburg, for £12,000, which is at his disposal." The truth was, the instructions of the Hamburg house were, that "as soon as Thompson lodged goods to the amount of £36,000 in defendant's hands, he was to give him credit for £12,000." Upon the representation made plaintiff sold the goods on credit, and Thompson soon thereafter failed. It was held that the suppression of the condition upon which the £12,000 was to be advanced was a material suppression of the truth, and evidence sufficient for the jury to find fraud, which is the gist of the action.

In the case of *Haycraft v. Cressy*, 2 East, 92, it was held, that if a party applied to stated that he knew A. B. to be of good credit, and spoke from his own knowledge, and not from hearsay, this will not sustain an action for deceit if the representation turn out to be false, if it appears that such representation was made by defendant *bona fide*, and with a belief of the truth of it, for the foundation of the action is fraud and deceit in defendant, and damage to plaintiff, and the assertion of his knowledge, in view of the subject-matter, *i. e.*, the credit of another, was nothing more than the expression of a strong belief upon what was believed to be reasonable grounds.

The distinction between this case and the one in 1 East is, that the defendant in one case believed to be true that which he asserted, while in the others he knew it was not true as he represented it.

In the notes to 2 Smith's Lead. Cas. 1868, citing numerous authorities, it is said, that in order to prove such fraud as will sustain this action, it is only necessary to show that what the defendant asserted was false within his own knowledge, and occasioned damage to the plaintiff; and so the law is laid down in Kerr on Fraud and Mistake, 53, 55, and 56.

There is nothing in *Lord v. Goddard*, 13 How. 200, in antagonism to the authorities above cited. Judge CATRON, in that

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case, says that the gist of an action for a false representation concerning the credit of another is fraud in defendant and damage to plaintiff.

If the party honestly stated his own opinion, believing at the time that he stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue.

So Chief Justice MARSHALL, in *Russell v. Clark's Exrs.*, 7 Cr. 69: "A representation concerning the credit of another, if honestly made, though actually false, does not render the person making it liable to an action." In the same case he says: "That a fraudulent recommendation (and a recommendation known at the time to be untrue would be deemed fraudulent) would subject the person giving it to damages sustained by the person trusting to it seems now to be generally admitted."

The case of *Pasley v. Freeman* recognizes and establishes this principle.

The result is that if a party represent as true that which he knows to be false, in such a way and under such circumstances as to induce a reasonable man to believe that it is true, and it is meant to be acted on, and the person to whom the representation has been made, believing it to be true, acts upon the faith of it, and by so acting sustains damage, such representation is fraudulent, and will sustain an action by the party damaged. Kerr on Fraud and Mistake, 53.

The charge of the court is not in conformity with the views expressed in this opinion, and for that reason the cause is reversed, and remanded for a new trial.

SUMNER V. SOUTHERN RAILROAD ASSOCIATION.

(7 Baxt. 345.)

Common carrier — connecting lines — rates of freight.

In the absence of an agreement, a carrier cannot bind other carriers, forming a connecting line with his own, as to rates of freight; and if such other carriers receive freight from the first carrier under a bill of lading issued by him, they do not impliedly assent to his rates, if the articles shipped are of a different character from those billed, and usually charged at a higher rate, but they may recover the higher rate for transportation.

ACTION to recover an alleged excess of freight. The opinion states the facts. The defendant had judgment below.

Hill & Harden, for complainant.

Vertrees, for defendant.

FREEMAN, J. Plaintiff shipped from St. Louis, by various steamboats, four lots of sewing machines, boxed up, put down in bill of lading, however, as hardware. The bill of lading specified that the shipment was to be sent to the wharf-boat at Memphis, "from thence by the Memphis and Charleston Railroad Company, or connecting roads, *subject to the conditions of their several charters and freight regulations*, and then be delivered at the company's depot at Bolivar, Tennessee, to A. Jordan, on presentation of his receipt, he or they paying for the same at the rate of eighty-six cents per hundred pounds."

When the boxes arrived at Bolivar by the cars of the Southern Railroad Association, having been received from the Memphis and Charleston Railroad at Grand Junction, the agent of the defendant had bill of lading of the Memphis and Charleston Railroad for the freight as sewing machines, which, under the freight regulations of both railroads, were chargeable at higher rates than hardware, and were so charged in the bill of lading. The charge, however, was only the regular charge established by regulation for carrying such freight. The agent of defendant at Bolivar paid the charges on the bill of lading, which consisted of what was due the Memphis and Charleston Company, and also what was paid the steamboat company by the Memphis and Charleston Company on receipt of the boxes by that company, retaining also the charge of his own company.

Jordan, the agent of Sumner, paid the sum thus charged, under protest, insisting that the railroads could only charge the rate specified by the steamboat company, and then brings their suit to recover the excess, amounting to about \$33.

It is further shown that there was no privity or connection between the steamboat line and the railroad companies, nor any authority or agency on the part of the steamboat company or line to make any contract for carrying freight for the companies.

It further very clearly appears that Sumner was perpetrating a fraud on the companies, and probably on the steamboats, by boxing

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the goods so as to conceal their character, and shipping them as hardware, at a lower rate of charges than if the shipment had been made as sewing machines.

On these facts, is the plaintiff entitled to his recovery against defendants, is the question.

The bill of lading is but the contract of the steamboat company, and can only bind it, under the facts of this case, but can have no effect to bind the railroads, unless they had assented to its terms, expressly or impliedly, by receiving the freight and shipping it at the same rates. By the contract with the steamboats, as contained in the bill of lading, they became the agents of Sumner to deliver the goods at the wharf-boat, and thence to the railroad company in the usual way. But on a fair construction of the language of the contract, the companies had the right to charge their regular established freight on the shipment, for it is expressly stipulated that the railroads are to carry it "subject to their several charters and freight regulations." No doubt the steamboat agent, who made the contract, supposed the freight would be 86 cents per hundred pounds on the shipment as hardware; but when the true character of the article was accidentally discovered by the agent of the M. & C. Railroad at Memphis, he clearly had the right when he received the boxes to bill them truly, and charge the freight authorized by "the freight regulations" of his company, and the Southern Railroad Association, receiving the boxes as sewing machines, and transporting them as such, had also the right to charge for them in their true character, and, according to usage in such cases, pay the charges of the other company at their regular tariff for such articles. In a word, the error in the plaintiff's argument in the case is in treating the contract of the steamboat company to charge 86 cents per 100 pounds as binding on the railroad companies, or in any way affecting their rights. In this view the plaintiff has only paid the steamboat what he contracted to pay, to-wit, 86 cents, and has had his goods transported by the railroad companies in accordance with their freight regulations—their regular tariff—and cannot complain, especially in view of the fraudulent effort to evade, by shipping sewing machines as hardware. That his fraudulent purpose has failed of success can certainly not furnish a very substantial cause of action against the defendant, nor one that appeals to a court of justice with any plausibility for its aid.

We have been referred by plaintiff's counsel to two cases from

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Massachusetts, which are supposed to hold a different view from what we have presented. We have examined them, but do not find them applicable to the question. The syllabus of the case of *Robinson v. Baker*, 5 Cush. 137, is as follows: "A common carrier who accepts goods for transportation from one not entitled to control them, has no lien upon the goods for his freight as against the owner; and it will make no difference that the carrier acted in good faith and was not in fault."

This is quite a different case from the one before us, the steamboat line in this case having undertaken as agent of Sumner to ship by these roads, and therefore having the right to control the goods and deliver them to the company for transportation. While the case cited may be correctly decided on its facts, it is no authority against the view we have taken of the case before us. We doubt, however, its correctness in the entire proposition cited, as the carrier, it would seem, at least would be entitled to pay for the transportation on his own road what it was reasonably worth when the consignee took the benefit of his labor by receiving the goods from him at their point of destination. The other case need not be noticed.

The case of *Schneider v. Evans*, 25 Wis. 241; s. c., 3 Am. Rep. 56, in its conclusions, sustains the view we have taken, and we think is sounder in its reasoning on this question than the case above referred to, though some of the reasoning of the judge in the last case we do not approve.

On the whole, we are satisfied the judgment for the defendant below was correct, and affirm it.

Judgment affirmed.

 HENLY V. HENNING.

(7 Bart. 524.)

Evidence — subscribing witness — party.

The rule that the execution of a writing must be proved by the subscribing witness is not modified by the recent legislation making parties competent witnesses.

REPLEVIN. The opinion states the case. The plaintiff had judgment below.

Henly v. Henning.

Lynn & Oldham, for complainant.*Marley & Stoele*, for defendant.

NICHOLSON, C. J. Henning sued Henly in replevin, in the Circuit Court of Lauderdale county, for a lot of seed cotton, to which he claimed title by purchase from James V. Ruth, and relied upon a bill of sale for the cotton executed to him by Ruth, with G. W. D. Ruth as a subscribing witness. Henning was examined as a witness in his own behalf, and produced and proved the bill of sale from Ruth, without calling the subscribing witness or accounting for his absence. This testimony was admitted over the objection of the defendant, who claimed the cotton by levy of an execution on it as the property of Ruth subsequent to the date of the bill of sale. Henning obtained a verdict and judgment, from which Henly appealed.

The only question in the case is, whether the court erred in allowing Henning to prove the bill of sale without calling or accounting for the subscribing witness.

The general rule of the common law in respect to the proof of private writings is, that where an instrument is attested by a subscribing witness, such witness must be called to prove its execution, if he can be produced and is competent to be examined. *Harrel v. Ward*, 2 Sneed, 612; Phil. on Ev. 464.

It is said, however, that the present case falls within one of the exceptions to this general principle, to-wit: that where the instrument is not directly in issue, but comes incidentally in question in the course of the trial, its execution may be proved by any competent evidence, without calling the subscribing witness. 1 Greenl. Ev., § 573 b.

But the bill of sale here is the foundation of the title of the plaintiff; it constitutes the evidence of his purchase of the cotton on which he relies for recovery. The parties did not choose to rely on a parol contract of sale and purchase, but reduced the same to writing and called a witness to attest its execution. The bill of sale is not, therefore, an instrument not coming directly in issue, but constitutes the evidence of title on which plaintiff relied on the trial. It is obvious that the case does not fall within the exception, but directly within the general rule. Nor is this general rule relaxed by the recent legislation making parties to suits competent

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witnesses. The plaintiff was a competent witness to prove any fact which any other witness might prove, but not to prove the execution of the bill of sale, which must be proved by the subscribing witness, or by other testimony only when the testimony of the subscribing witness cannot be procured, after proper efforts to produce it.

The necessity of adhering to the rule is apparent in a case like the present, where the question was, whether the purchase of the cotton by the plaintiff was fair and *bona fide*. The defendant had a right to all the knowledge of the subscribing witness as to the transaction. It follows that the Circuit judge erred in overruling the objection of defendant to the testimony of plaintiff as to the execution of the bill of sale, without accounting for his failure to produce the subscribing witness.

The judgment is reversed and a new trial awarded.

Judgment Reversed.

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

COOPER V. STATE

(5 Tex. Ct. App. 215.)

Bail — action against — imprisonment of principal elsewhere.

In an action on a bail bond for the appearance of an indicted person, it is a good defense that the person was in prison in another county in the same State, on conviction for another offense.

ACTION on a bail bond. The opinion states the facts. The plaintiff had judgment below.

Assistant Attorney-General George McCormick, for the State.

ECTOR, P. J. This case is an appeal taken by O. W. Cooper on a judgment final rendered against him by the District Court of Jack county, on a forfeited bail bond. It appears that one Jim Pate, who was indicted for theft of cattle, executed the bond in question, with O. W. Cooper and James R. Callis as his sureties, to the sheriff of Parker county, on October 13, 1875, for the personal appearance of the said Pate at the next term of the District Court of Jack county, on the fourth Monday in October, 1875, to answer the charge. Pate failed to appear at the May term, 1877, of the District Court of Jack county, and a judgment *nisi* was rendered against him and his sureties. At the November term,

1877, of the court Cooper appeared, and, in answer to the *scire facias*, stated that the judgment *nisi* rendered against him on May 9, 1877, in the case of *State of Texas v. Jim Pate*, set out in the *scire facias*, should not be made final, because Pate, the principal in the bond forfeited, had been regularly indicted, tried, and convicted of a felony in the District Court of Parker county, State of Texas, at its April term, 1876, for the term of two years, and that by virtue of the trial and conviction as aforesaid the said Pate was held under process of the District Court of Parker county, issued pursuant to the judgment aforesaid, and was by said process of law restrained of his liberty, and by such restraint was prevented from being in attendance upon the May term, A. D. 1877, of the District Court of Jack county, where the forfeiture was taken; wherefore appellant prayed that the forfeiture *nisi* be set aside, etc. The court, after hearing said answer read, was of the opinion that it set up no legal or valid cause why the judgment *nisi* should not be made final, and refused to hear any evidence to sustain said answer, but proceeded at once to render a final judgment against Pate and Cooper on the bond. Cooper excepted to this ruling, and has taken an appeal to this court.

We believe that the answer of appellant set up a good and legal cause why the judgment *nisi* should not be made final, and that the court below should have allowed him to introduce evidence to sustain the allegations made in his answer.

Bail is the security given by a person accused of an offense that he will appear and answer before the proper court the accusation brought against him. Those who become bail for the accused, or either of them, may at any time relieve themselves of their undertaking by surrendering the accused into the custody of the sheriff of the county where he is prosecuted. Bail, says Mr. Bouvier, are those persons who become sureties of the defendant in court. Again, he says their powers over the defendant are very extensive, as they are supposed to have the custody of the defendant.

In the case of *Gay v. State*, 20 Tex. 507, Mr. Justice WHEELER speaks of them as being "manu captors of the defendant,—his jailers." When the State, under lawful authority, has deprived the securities of control over their principal, and placed it beyond their power to relieve themselves of their undertaking by surrendering the accused into the custody of the sheriff of Jack county, the State by its own act has changed their relation to the obligee in the

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bond. The trial and conviction of the principal in the bond for a felony, and his confinement by the State in pursuance of the judgment of conviction, were acts inconsistent with any rights in the bail to the custody of Pate.

In the case of *Peacock v. State*, 44 Tex. 11, the Supreme Court decided that the sureties on a bail-bond are relieved by a second arrest and bail of their principal on the same indictment, even though the second bond was held defective and quashed. We make the following extract from that opinion: "So long as Miller was left in the custody of his bail, or was under their control, they were bound for his appearance, and liable for the penalty of the bond for his non-appearance. Any act done by the State or its officers, under lawful authority, that would deprive the securities of control over their principal, would change the relation the parties sustained to each other and their relation to the State, and would thereby relieve the sureties from their obligation."

In the State of Tennessee, where the governor of one State, on the demand of the governor of another State, surrendered a person who had been previously arrested for murder in the former State, and bound over, and who was on bail at the time of the demand made, it was held that the delivery of him by the former State to the constituted authorities of the latter discharged the bail from his recognizance. *State v. Allen*, 2 Humph. 258. See, also, *Canby v. Griffin*, 3 Harr. 333; *People v. Stager*, 10 Wend. 437.

The judgment of the District Court is reversed and the cause remanded.

Reversed and remanded.

SUMMERS V. STATE.

(5 Tex. Ct. App. 365.)

Criminal law — witness — physician — post-mortem examination.

On a criminal trial it seems that a physician, who has made a *post-mortem* examination, may be compelled to testify concerning its results and his opinions derived therefrom.*

* See *contra*, *Buchanan v. State* (59 Ind. 1), 25 Am. Rep. 612.

INDICTMENT for murder of Martinez. The opinion states the facts.

McC Campbell & Givens, for appellant.

W. B. Dunham, assistant attorney-general, for the State.

ECTOR, P. J. [Omitting other matters.] The testimony further shows that Martinez, shortly after receiving the blow, became unconscious, and Dr. Arthur E. Spohn was sent by Mr. Kennedy to see Martinez. Dr. Spohn, a witness for the State, in his testimony says: "He was a medical practitioner. On the second of September, 1878, was called upon to go and see Benito Martinez, then lying at a camp near Kennedy's pasture; found the deceased breathing, but unconscious; had a contusion upon the left side of the head, but no exterior evidence of fractured skull; removed the patient to town, and attended him until the next day, when he died; after death made a *post-mortem* examination, but I decline to state the cause of the man's death, as my knowledge was obtained by professional skill and from the deductions of experience, which I consider my own property, and which the county of Nueces has persistently refused to pay for. I have no knowledge of the actual cause of the man's death save through the *post-mortem examination* alluded to." The court sustained the objection of Dr. Spohn in refusing to disclose the knowledge acquired in said examination, on the ground that he, not being paid, could not be compelled to testify as to the same.

[Omitting a minor point.]

The court may compel a physician to testify as to the result of a *post-mortem* examination; and it is to be regretted that a member of a profession so distinguished for liberal culture and high sense of honor and duty should refuse to testify in a cause pending before the courts of his country, involving the life or liberty of a fellow-being and the rightful administration of the laws of a common country. Dr. Spohn has doubtless been misled in taking the position he did by the misconceptions of certain writers on medical jurisprudence. The question has been recently before the Supreme Court of Alabama, in the case of *Ex parte Dement*, and after a thorough examination of the American and English cases bearing on the question, the court held that the law allows no excuse for withholding evidence which is relevant to the matters in question

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before its tribunal; that the administration of justice being a source of mutual benefit to all the members of a community, each is under obligation to aid in furthering it, as a matter of public duty; and the same principle which justifies the bringing of the mechanic from the workshop, the merchant from his storehouse, the broker from his 'change, or the lawyer from his engagements to testify in regard to some matter which he has learned in the exercise of his art or profession, authorizes the summoning of a physician, or surgeon, or skilled apothecary to testify of a like matter, when relevant to a cause pending for determination in a judicial tribunal; and that no court would be excusable in exonerating them from giving such evidence without pay, on the ground that it would be a professional opinion. *Ex parte Dement*, 53 Ala. 389; s. c., 25 Am. Rep. 611. A medical expert could not be compelled to make a *post-mortem* examination unless paid for it; but an examination having already been made by him, he could be compelled to disclose the result of that examination.

The appellant in this case, however, cannot be heard to complain of the ruling of this court in sustaining the objection of Dr. Spohn in refusing to disclose the knowledge acquired in said *post-mortem* examination. If the undisclosed facts would have benefited the defendant his counsel should have made Dr. Spohn their own witness, and have asked the court to enforce the law in their own behalf. This was not done, and no exception was taken by defendant to the action of the court in sustaining said objections of Dr. Spohn. The result of the ruling was not to weaken the defendant's cause.

[Omitting other matters.]

Judgment affirmed.

BOSTON V. STATE.

(5 Tex. Ct. App. 383.)

Evidence — judicial notice — minor geographical divisions.

A court will not take judicial notice that a particular locality is or is not within a particular county.

CONVICTION of murder. The opinion states the point.

Lackey & Stayton, for appellant.

Assistant Attorney-General W. B. Dunham, for the State.

WINKLER, J. It is argued, on behalf of the appellant, that there was "no proof in the case that the offense for which he was convicted was committed in De Witt county, Texas, or at any place which would give the District Court of that county jurisdiction." On the part of the State it is conceded that the statement of facts does not show that the venue was proved.

The indictment charges the appellant with the murder of Bill Kinney, committed in De Witt county. We have carefully examined the evidence as set out in the statement of facts, which counsel on both sides agree is a full statement of all the material facts in evidence upon the trial of the cause, and is approved by the judge who presided at the trial in the District Court; and whilst several places are mentioned by the witnesses, it is nowhere stated that any one of the places named is within the county of De Witt, or that the offense was committed at any place which this court can judicially know to be within the limits of that county.

Whilst courts take notice of the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government, and of the local divisions of their country,—as into States, provinces, counties, cities, towns, local parishes, or the like,—so far as political government is concerned or affected, and of the relative positions of such local divisions, but not of their precise boundaries, further than they may be disclosed in public statutes (1 Greenl. on Ev., § 6), still courts do not take notice that particular places are or are not in particular counties. *Brunt v. Thompson*, 2 Ad. & E. 789 (N. S.), top page 913, referred to by Mr. Greenleaf as *Bruce v. Thompson*, in note 7 to § 6, vol. 1.

Because there is no proof that the offense for which the appellant was tried was committed in De Witt county, the judgment must be reversed. The venue must be proved, else the testimony will not support a verdict of guilty. *Bell v. State*, 1 Tex. Ct. App. 81, and many other cases.

Other questions of interest are raised by the bill of exceptions set out in the transcript, and which have been argued by counsel for the appellant. Inasmuch, however, as these matters have not been discussed on behalf of the State, doubtless for the reason above

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stated, and because these questions are not likely to arise in the same form on another trial, we have not deemed it important to pass upon them now.

For the reasons hereinbefore stated, the judgment is reversed and the cause remanded.

Reversed and remanded.

EX PARTE FOSTER.

(5 Tex. Ct. App. 625.)

Criminal law — right to bail in capital cases — “proof evident.”

Under the constitutional provision allowing bail in capital cases except where “the proof is evident,” bail will be denied if the evidence adduced on the application would sustain a verdict of murder in the first degree, but otherwise bail will be granted.

APPPLICATION for bail in a murder case. The opinion states the point. The application was denied below.

J. P. Bell, and Cherley & Haygerty, for appellant.

Assistant Attorney-General Thomas Ball, for the State.

WHITE, J. [Omitting other matters.]

Taking the record as an entirety, and considering all the testimony as it here appears, is the prisoner entitled to bail? Our present Constitution provides that “all prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident.” Const., art. 1, § 11. What is the proper definition to be given, and the legal interpretation to be placed upon the words, “when the proof is evident,” as used in the constitutional provision quoted, has been a most fruitful source of discussion with the legal profession of the State since the adoption of the Constitution of 1869, where the same language is used as in the present Constitution. No legal construction has ever been directly given it. In the case of *Ex parte Rothschild*, 2 Tex. Ct. App. 560, this court promised to avail itself of the first suitable case to discuss the meaning of these words, and to declare which would regulate and govern the action of this court in its adjudications upon *habeas corpus* cases.

In *McCoy v. State*, 25 Tex. 33, our Supreme Court gave their interpretation of the meaning of the expression, "proof is evident or presumption great," as used with reference to bail, in the ninth section of article 1 of the Constitution of 1845. ROBERTS, J., says: "The terms * * * are as definite to the legal mind as any words of explanation could make them, and are intended to indicate the same degree of certainty, whether the evidence be direct or circumstantial. The design is to secure the right of bail in all cases, except in those in which the facts might show with reasonable certainty that the prisoner is guilty of a capital offense."

The omission of the words, "or presumption great," and the use of the expression, "proof is evident," in the present Constitution, it is contended, materially change the rights of a prisoner, and require, to justify a refusal of bail, the establishment of a much more direct and certain case of guilt than formerly. Doubtless this is so. Some however (able lawyers) go to the extent of insisting that a mere conflict of testimony will necessarily entitle a party to bail, since that cannot be said to be evident which admits of dispute; and the case of *Ex parte Miller*, 41 Tex. 213, is frequently cited in support of this position. When examined with reference to the facts of the case before the court, and which were the facts to which alone the language of the opinion relates, or even independently considered, we do not think the rules therein laid down warrant such construction.

Again, it is insisted that the only true and correct meaning of the word "evident" is that given it by lexicographers whose works are recognized as of standard authority. Take, for instance, the definition given by Webster, and we believe his definition is about the same as that of most standard authors. He defines "evident" to be, "*clear to the mind*; obvious; plain; apparent; manifest; notorious; palpable." This is very satisfactory, is doubtless accurate and correct, and as we shall endeavor to show hereafter, not inconsistent with our view of the constitutional expression, "proof is evident," even when subjected to philological construction. Perhaps we cannot succeed better in making ourselves understood than by declaring the general rules which will control and govern us in refusing bail, under the constitutional prohibition, than by attempting to announce a definite abstract meaning for the constitutional expression, which is not easily defined.

The Supreme Court of Pennsylvania have laid down a rule upon

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this subject which we think worthy of approval. In *Commonwealth v. Keeper of Prison*, 2 Ashm. 227, it is said to be "a safe rule, where a malicious homicide is charged, to refuse bail in all cases where a judge would sustain a capital conviction, if pronounced by a jury, on such evidence of guilt as was exhibited to him on the hearing of the application to admit to bail; and, in instances where the evidence of the Commonwealth is of less efficacy, to admit to bail." 2 Ashm. 227; Hurd on Habeas Corpus, 438; *State v. Summons*, 19 Ohio, 139; *Ex parte Bryant*, 34 Ala. 270.

The same idea is tersely and happily expressed by BRICKELL, C. J., in *Ex parte McAnally*, 53 Ala. 495: s. c., 25 Am. Rep. 646. He says: "If the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offense has been committed; that the accused is the guilty agent; and that he would probably be punished capitally if the law is administered, bail is not a matter of right." See, also, *Ex parte Nettles*, Sup. Ct. Ala., A. D. 1878.

We know of no better exposition of our views with regard to the proper construction of the constitutional expression, "proof is evident," than the two rules quoted; and when subjected to strictest criticism, we cannot see that they are in anywise inconsistent with the definition quoted from Mr. Webster. Besides this, they furnish ample restrictions to regulate and govern the action of the courts in their adjudications upon questions of bail in capital cases.

When we apply the doctrine thus enunciated to the facts in evidence, as shown in the record before us, we are not satisfied that "the proof is evident." Consequently, we believe that the applicant is entitled to bail. We do not wish to be understood as saying that he is not guilty of murder in the first degree, and that this fact may not be made to appear most fully upon his final trial. We are only passing upon the sufficiency of the evidence as exhibited in this record, and upon it alone is our opinion predicated. We will not comment upon it, lest our comments should influence the final trial; to decline to do so is the uniform practice, as it has always obtained in such cases.

Bail granted.

SULLIVAN V. STATE.

(6 Tex. Ct. App. 319.)

Criminal law — evidence — witness' testimony on preliminary examination.

"Testimony given by a witness on a preliminary examination before a committing magistrate in a criminal case, where he was confronted with the accused and subjected to cross-examination, may be introduced by either party on the subsequent trial, where the witness is dead, cannot be found, or absents himself at the instance of the opposite party; but not where it is merely shown that he is out of the State.

CONVICTION of murder in first degree. Dean was a witness before the committing magistrate, on the preliminary examination, and it being shown that he was in Boston, Mass., a deputy clerk was allowed to testify to what he swore to on such examination.

Harwood & Winston, and Fly & Davidson, for appellant.

Assistant Attorney-General Thomas Ball, for the State.

WINKLER, J. [Omitting other matters.]

The next important inquiry is, was it competent for the State to prove, under the circumstances disclosed by the record, what the witness Dean had testified to before the examining court?

The Constitution (art. 1, § 10, of the Bill of Rights) declares that "in all criminal prosecutions" the accused "shall be confronted with the witnesses against him." The Code of Criminal Procedure, art. 24, provides that "the defendant upon a trial shall be confronted with the witnesses, except in certain cases, provided for in this Code, when depositions have been taken." In treating of constitutional provisions similar to the one above set out, and found in all the constitutions of the several States and in that of the United States. Mr. Cooley lays down as the correct rule, deducible from the authorities, and which we adopt as correct, the following:

"The testimony for the people in criminal cases can only, as a general rule, be given by witnesses who are present in court. The defendant is entitled to be confronted with the witnesses against

him ; and if any of them be absent from the Commonwealth, so that their attendance cannot be compelled, or if they be dead, or have become incapacitated to give evidence, there is no mode by which their statements against the prisoner can be used for his conviction. The exceptions to this rule are of cases which are excluded from its reasons by their peculiar circumstances ; but they are far from numerous. If the witness was sworn before an examining magistrate, or before a coroner, and the accused had an opportunity then to examine him ; or if there were a former trial, on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned, but appears to have been kept away by the opposite party." COOLEY'S Const. Lim. orig. pp. 363, 364.

Agreeably to Mr. Greenleaf, "upon the question whether this kind of evidence is admissible in any other contingency except the death of the witness, there is some discrepancy among American authorities." 1 Greenl. on Ev., § 163, note. The rule in the text appears to be that "when the testimony was given under oath, in a judicial proceeding in which the adverse litigant was a party, and where he had the power to cross-examine, and was legally called upon so to do, the great and ordinary test of truth being no longer wanting, the testimony so given is admitted, after the decease of the witness, in any suit between the same parties. It is also received if the witness, though not dead, is out of the jurisdiction or cannot be found after diligent search, or is insane, or sick and unable to testify, or has been summoned, but appears to have been kept away by the adverse party. But testimony thus offered is open to all the objections which might be taken if the witness were personally present."

There has also been controversy as to whether these rules apply to other than civil causes, and the position that they do not apply to criminal cases has been strenuously and ably maintained ; but it seems now to be settled that these rules apply to civil and criminal cases alike, so far as reproducing the testimony of a deceased witness is concerned. Whart. Cr. Law, § 667, note c, and authorities there cited. "The testimony of a deceased witness, given at a former trial or examination, may be proved at a subsequent trial by a person who heard him testify." Id., § 667. To this extent the question is not an open one in this court. In *Black v. State*, 1 Tex.

Ct. App. 368, it was held, that at a second or subsequent trial of a criminal charge, it is competent for the prosecution to put in evidence testimony given at a previous trial by a witness who has since died; and such testimony may be proved by a witness who heard it given in, and who can qualify himself to state the substance of it. In *Johnson v. State*, 1 Tex. Ct. App. 333, it was, after mature consideration, held that the rules and practice of the common law have been substantially adopted by our Code in respect to admitting as evidence for the prosecution the deposition of a deceased witness, duly taken on a former trial of the accused by a court or an examining magistrate, and that the act of 1866 (Pasc. Dig. art. 6605), which expressly secures to the accused the right to use such evidence, does not abrogate or impair that of the State to use such testimony.

But the question here is, not as to the right to reproduce the testimony of a deceased witness taken at a former trial, but the right here claimed and exercised by the State is to prove the former testimony of a living witness; or at least, one who is not shown or claimed to be dead, but who, it is claimed, is not within the jurisdiction of the court or its process. It is not perceived that the reason of the rule which admits proof of what a deceased witness had on some former occasion, between the same parties, on an examination into the same criminal charge, on a former trial, testified to, as admissible on a subsequent trial of the same case, does not apply with equal force to one who, though not dead, is beyond the reach of the process of the court. The testimony of the deceased witness is admitted on the idea that the deceased had been confronted with the witness on the former trial — had met him face to face — and that the witness had testified before a competent tribunal under the sanction of an oath, and an opportunity afforded for cross-examination.

The inaccessible witness has been subjected to the same ordeal, the only difference being that the one is dead and the other out of reach. Each had confronted the accused, testified under the sanction of an oath, duly administered; and as to each, an opportunity for cross-examination has been afforded. According to Mr. Bishop, the principle on which these depositions are — under statutes like those which prevailed in England down to a recent period — admissible is, that being regularly taken under provision of law, the common law accepts them when it is impossible the personal

presence of the witness can be had. 1 Bish. Cr. Proc., § 1096. It is however plain, in matter of judicial reason, that this right to introduce the deposition grows out of the great doctrine of necessity. * * * And in practice it was never known that the sort of depositions thus mentioned were received when the living presence of the witness could be had. Id., §§ 1098, 1099.

The principle applies, not only to those formal depositions, but likewise to evidence of what a witness testified orally at a previous trial. It moreover prevails not only in civil causes, but in criminal; and in general, in the United States as well as in England. There are with us, perhaps, some judicial localities in which this doctrine is not received. * * * But the admission of the evidence is limited, or nearly so, to the case in which the witness is deceased; and in this case it is the general American doctrine to receive equally the depositions taken as before mentioned, and evidence of the former, or oral, testimony. If the witness is absent by the procurement of the defendant, it is, perhaps, the American doctrine, the same as it is the English, that the deposition or evidence of his former testimony may be received against him. But when the witness is, without this element, merely in another State or otherwise beyond the power of the court, this is not sufficient. 1 Bish. Cr. Proc., § 1098.

These and similar rules — deduced as they are from adjudications in other States and countries — are of necessity based upon, and influenced more or less by, statutory regulations, and liable to be modified and controlled thereby, and with us must be held in subordination to whatever local statute, if any, we have on the subject. Here we have a statute which provides that "the rules of evidence known to the common law of England, both in civil and criminal cases, shall govern in the trial of criminal actions in this State, except when they are in conflict with the provisions of this Code or some statute of this State." Code Cr. Proc., art. 638. "The rules of evidence prescribed by the statute law of this State in civil suits shall, so far as applicable, govern also in criminal actions, when not in conflict with the provisions of this Code or of the Penal Code." Id., art. 639. "In proceedings before an examining court, the testimony of all the witnesses shall be reduced to writing, signed by them with their names or marks, and all the testimony thus taken shall be certified to by the magistrate." Id., art. 238. "The examination of witnesses shall be in the presence

of the accused." Id., art. 240. "Should no counsel appear either for the State or the defendant, the magistrate may examine the witnesses, and the accused has the same right." Id., art. 247.

"In all criminal prosecutions, when the testimony of a witness has been reduced to writing, signed, and sworn to before an examining magistrate, or before any court, and the witness has died since giving his testimony, the testimony so taken and reduced to writing may be read in evidence by such defendant, as proof of the facts therein stated, upon any subsequent trial for the same offense; *Provided, however*, that in all other respects the testimony of such deceased witness shall be subject to the established rules of evidence in criminal cases. In every case, the death of the witness must be established to the satisfaction of the court." Pasc. Dig., art. 6605. Whilst this seems to be a privilege granted to the accused, yet, as we have seen in *Johnson v. State*, 1 Tex. Ct. App. 333, by the rules of practice the prosecution virtually has the same privilege. And whilst the provisions of this article, as well as the ruling in *Johnson's* case, have reference to the testimony of a deceased witness, as we have already seen, the reason for the rule applies as well to a witness whose personal presence cannot be had, and that the testimony of a witness who had been spirited away after having testified ought to be received.

Yet, inasmuch as this species of testimony is admitted as a sort of judicial necessity, the proof of the facts which constitute the necessity for the departure from general rules ought to be clearly established, before the testimony is admitted, — as that the witness is dead, that diligent inquiry has been made for him where it is most likely he would be found, or that the defendant had caused his absence. The proof on this subject should be complete and satisfactory, as the question of the sufficiency of this proof would necessarily be confided largely to the discretion of the judge, and not be revisable on appeal when properly exercised.

On the whole, we are of opinion the authorities warrant the following conclusions: First, that a county judge is a magistrate authorized to hold an examining court; second, that when a witness has testified before an examining court on the investigation of a criminal charge against any person, the testimony taken before such examining court, in the manner prescribed by law, may be used as testimony on the trial, upon satisfactory proof being first made that the witness whose testimony is offered has either died

since testifying, or been prevented from attending by the opposite party, or that he cannot, after diligent inquiry, be found, or his whereabouts ascertained; and that the testimony so taken and reduced to writing before an examining magistrate may be used either by the prosecution or by the accused; third, that when a witness has testified on a former trial of the case, it is competent for either party to prove what the witness, if he has since died, testified on the former trial; and fourth that, in either case, the bare fact that the witness was out of the State at the time of the second trial would not, of itself, be sufficient ground for admitting proof of his former testimony in a criminal prosecution, unless admitted by consent.

Applying these rules to the case at bar, we are of opinion the prosecution had a right to read as evidence on the trial the testimony of the witness Dean, given in the examining court before the county judge, and that the better evidence as to what he testified would have been the production of the written testimony so taken; and on this account we see no error, as it appears that the witness Titcombe read from the written statement of the witness Dean, taken on the preliminary examination before the county judge.

Yet we are of opinion that the absence of the witness Dean was not sufficiently accounted for, at the trial, to allow the introduction of his testimony taken before the examining court. The evidence upon which Dean's testimony was admitted was that of the witness Smeed, hereinbefore set out, which need not be repeated, and which is mentioned in the second bill of exceptions taken to the admission of Smeed's testimony. To our mind, the tangible defect in this testimony is the want of any showing of proper effort to ascertain the fact as to whether the witness Dean could be produced on the trial or not; whereas it should have been shown that it was not in the power of the State to produce the witness in person, before admitting his former testimony. One main ground of the statement of the witness Smeed appears to have been based partly upon a letter, which was not even produced on the trial. We are of opinion the showing, taken as a whole, did not show either that any proper effort had been made to learn the whereabouts of the witness Dean, or to show the inability of the prosecution to produce him in person on the trial. This was a matter of great moment to the accused. He did not stand by in silence and permit the error to be committed without objection; on the contrary, he ob-

jected to the proceeding at the time, and also followed it up by bill of exceptions, and in his motion for a new trial, and in his assignment of errors, substantially; and for this error, which is the turning-point in the case, the judgment must be reversed.

It is shown by bill of exceptions that the defendant offered to prove by a witness (Parker) that the witness Dean was passing under an assumed name. There was no error in excluding this testimony; it was but hearsay.

We are of opinion the objections to the charge of the court are not well taken. In the main, the charge correctly informed the jury on the law of the case as made by the evidence, and there was no important omission. Whether this would be a proper charge on another trial, or not, depends upon the case and the testimony as the same shall be developed. If the charge should need modification or enlargement, these will readily suggest themselves when the occasion arises. There is nothing further suggested by the record requiring any special ruling.

For the single error above set out, the judgment must be reversed and the cause remanded.

Reversed and remanded.

AKE V. STATE.

(6 Tex. Ct. App. 396.)

Criminal law — evidence — burden of proof as to non-age.

Where by law the death penalty cannot be inflicted for a given offense committed by a person of less than seventeen years of age, the burden of proof showing his non-age is on the defendant.

CONVICTION of rape; sentence of death. The opinion on the rehearing sufficiently states the point.

D. G. Wooten and Newton S. Walton, for appellant.

Assistant Attorney-General Thomas Ball, for the State.

WHITE J. With an earnestness and zeal for a poor and unfortunate client which cannot be too highly commended, the counsel who, under appointment of the court, and without fee or the hope

of reward, so ably represented this appellant on the trial in the lower court and upon his hearing upon appeal here at a former day of this term believing that a question of law, important to the rights and the very life of defendant, had not been settled by our opinion of the thirtieth day of April last, affirming the judgment assessing the death penalty against him, have filed a motion for a rehearing in the case; and in a printed brief, which exhibits great research and ingenuity of argument, attempt to support the motion in their elaboration of the question involved.

In response, the assistant attorney-general, impressed also with the importance of the question, has spared no pains in the skillful argument which he submits in opposition to the motion.

As insisted upon by appellant's counsel, the position is, that our statute having by express terms provided that "a person, for an offense committed before he arrived at the age of seventeen years, shall in no case be punished with death" (Pasc. Dig., art. 1638), and defendant having directly tendered that issue on the trial, and invoked the protection of the statute, the burden of proof was upon the State to show that he was not within the exemption, and that the showing must be maintained on her part by positive, affirmative, and indubitable evidence.

As here presented, neither this question, nor any one exactly analogous, has ever been decided in this State. True, we frequently meet such expressions as: "The rule of law is, that the burden of proof never shifts, and is on the government throughout, even where the allegation of a fact is negative in its character." *Shanks v. State*, 25 Tex. 326. "The burden of proof to show the truth of the charge is at all times on the State." *Black v. State*, 1 Tex. Ct. App. 369. "In cases of theft, the burden of proof is on the State at all times." *Chapman v. State*, 1 Tex. Ct. App. 728. "The burden of proof rests always on the State, and does not shift." *Templeton v. State*, 5 Tex. Ct. App. 398. These are but enunciations of an elementary rule.

As stated by Mr. Burrill in his work on Circumstantial Evidence, rule 1 is, that "the *onus* of proving every thing essential to the establishment of the charge against the accused lies on the prosecution." He says: "This rule has otherwise been stated thus: 'The burden of proof is always on the party who asserts the existence of any fact which infers legal accountability.' It is a universal rule of evidence, founded on the most obvious principles of

justice and policy, and derived from the great fundamental maxim of law, that every person must be presumed innocent until proven to be guilty." Burrill on Cir. Ev., 728.

In Redfield's edition of Greenleaf on Evidence, § 81b, vol. 1, he says: "It would seem to be the true rule in criminal cases, though there are some decisions to the contrary, that the burden of proof never shifts, but that it is upon the government throughout; and that in all cases, before a conviction can be had, the jury must be satisfied upon all the evidence, beyond a reasonable doubt, of the affirmative of the issue presented by the government, to wit, that the defendant is guilty in manner and form as charged in the indictment;" and he cites the opinion by BIGELOW, J., in the case of *Commonwealth v. McKie*, 1 Gray, 61-65, as containing an acceptable and very able exposition of the general rule of law as to the burden of proof in criminal cases.

Turning to that decision, we make the following liberal extract from the opinion of the learned judge: "The general rule as to the burden of proof in criminal cases is sufficiently familiar. It requires the government to prove, beyond a reasonable doubt, the offense charged in the indictment; and if the proof fails to establish any of the essential elements necessary to constitute a crime, the defendant is entitled to an acquittal. This results, not only from the well-established principle that the presumption of innocence is to stand until it is overcome by proof, but also from the form of the issue in all criminal cases tried on the merits, which, being always a general denial of the crime charged, necessarily imposes on the government the burden of showing affirmatively the existence of every material ingredient which the law requires in order to constitute an offense. If the act charged is justifiable or excusable, no criminal act has been committed, and the allegations in the indictment are not proved. And this makes a broad distinction in the application of the rule of the burden of proof to civil and criminal cases. In the former, matters of justification or excuse must be specially pleaded in order to be shown in evidence, and the defendant is, therefore, by the form of his plea, obliged to aver an affirmative, and thereby to assume the burden of establishing it by proof; while in the latter all such matters are open under the general issue, and the affirmative, namely, proof of the crime charged, remains in all stages of the case upon the government." But he further says: "There may be cases where a de-

defendant relies on some distinct, substantive ground of defense to a criminal charge, not necessarily connected with the transaction on which the indictment is founded (such as insanity, for instance), in which the burden of proof is shifted on the defendant." 1 Gray, 61. As to the law with regard to insanity, in this State, see *Webb v. State*, 5 Tex. Ct. App. 596.

Mr. Redfield says: "Although the above decision is carefully limited to that precise case, yet it would seem that its principle would cover all cases, including those in which the defendant relies upon some distinct, substantive ground of defense, not necessarily connected with the transaction on which the indictment was founded — as insanity, for instance. For, in every case, the issue which the government presents is the guilt of the defendant; and to prove this the jury must be satisfied, not that the defendant committed the act constituting the *corpus delicti*, but that also at the time of the commission thereof, he had intelligence and capacity enough to have a criminal intent and purpose; because if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling power, or if by the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts." 1 Greenl. on Ev. (Redf.), § 81c; *Webb v. State*, 5 Tex. Ct. App. 596.

As thus enunciated, we believe the doctrine to be correctly asserted, and we know of no decision of any of the courts in this State which has ever controverted or contravened it. On the contrary, the extent to which our courts have gone is stated in *Hall v. State* (Galveston term, 1875), not reported, but quoted in *Perry v. State*, 44 Tex. 473, and *Brown v. State*, 4 Tex. Ct. App. 275, in which latter case it is said: "In the case of *Hall v. State* (Galveston term, 1875), this subject was fully considered, and after a careful examination of the statutory provisions bearing upon it, and a review of the leading authorities, the conclusion is arrived at that the burden of proof is not on the defendant in a criminal case in the sense in which it is understood to rest on the defendant in a civil suit. In a criminal prosecution, where the accused relies on the plea of not guilty, admitting nothing, the *onus* is on the State to overcome the legal presumption of his innocence; and the question of his guilt is to be decided from the whole evidence, without pausing to inquire whether it was introduced by him or the State."

In fact, we know of no case where it has ever been held that the rule that "the burden of proof never shifts from the State" has been held to extend further than proof of the case as charged in the indictment; nor of any case where, if the defendant seeks to excuse himself from liability on account of some substantive, distinct matter, he has not been held to have the laboring oar, and the *onus* of making good his issue thus presented.

Take, for instance, non-age, as provided by statute (Pasc. Dig., art. 1638), which reads: "No person shall, in any case, be convicted of any offense committed before he was of the age of nine years; nor of any offense committed between the years of nine and thirteen, unless it shall appear by proof that he had discretion to understand the nature and illegality of the act constituting the offense." Here we have an instance in which the burden of proof must actually shift twice, before a conviction can be had,—first upon the defendant, to establish that he is between the years of nine and thirteen (*McDaniel v. State*, 5 Tex. Ct. App. 475); and, second, back upon the State, to show that though between the years of nine and thirteen, he had discretion sufficient to understand the nature and illegality of the act constituting the offense. *Wusnig v. State*, 33 Tex. 651. The fact that he is of non-age is a distinct, substantive matter, which the defendant must show before the State is required to prove the intelligence necessary to make him liable for his acts.

Again: take the law of assaults. There it is provided that the "pointing of an unloaded gun, or the use of like means, with which no injury can be inflicted, cannot constitute an assault." Pasc. Dig., art. 2144. Yet in such a case it has been held, time and again, that the burden of proof is upon the defendant to show that the gun was not loaded. *Caldwell v. State*, 5 Tex. 18; *Crow v. State*, 41 id. 468; *Forrest v. State*, 3 Tex. Ct. App. 232; *Burton v. State*, 3 id. 408. Again: "When it is shown that a wound which might be fatal has been inflicted by the accused with a murderous intent, then the burden of proof is on him to show that the death of the deceased resulted from malpractice or culpable neglect of the attending surgeon, or from some cause other than that of the wound." *State v. Briscoe*, 30 La. Ann. 433.

It is unnecessary to illustrate the question further. The instances cited show that the maxim that the burden of proof in criminal cases never shifts from the State means only that it never shifts

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in so far as it is necessary to make out the specific case of murder or rape, or any other offense charged in the indictment, by establishing the *corpus delicti* and the constituent elements of the crime. When distinct, substantive matter is relied upon by the defendant to exempt him from punishment and absolve him from liability, then that is matter foreign to the issue as made by the State in her charge against him, and the burden of proving it, in reason, common sense, and law, should be upon the defendant.

We are not without authority directly in point, so far as the facts in the case we are considering are concerned. The case of *State v. Arnold*, 13 Ired. 184, presents the identical question here made. It was there held that, "when the defense, on an indictment for murder, is that the prisoner was under the age of presumed capacity, the *onus* of proof lies upon the prisoner. If the age can be ascertained by inspection, the court and jury must decide."

We see no occasion to disturb the judgment heretofore rendered in this case, and the motion for a rehearing is, therefore, refused.

Rehearing refused.

YANEZ V. STATE.

(6 Tex. Ct. App. 429.)

Criminal law — trial — jurors not understanding English — waiver of objection.

The objection that jurors on a criminal trial did not understand the English language is waived if not specifically taken at the trial.

CONVICTION of assault with intent to murder. The opinion states the point.

Assistant Attorney-General Thomas Ball, for the State.

WHITE, J. This case is an appeal from a judgment of conviction for an assault with intent to murder, wherein appellant's punishment is assessed at two years in the penitentiary.

The first bill of exceptions complains that the court, during the cross-examination of the principal State's witness, stopped the examination, and ruled that it should proceed no further. The explanation given by the court for its action is, that the defendant's

counsel had asked the same questions repeatedly, and the court refused to have them again repeated.

The mode and manner of conducting the examination of witnesses on a trial is, and must necessarily be, left in a great measure to the discretion of the judge presiding. 1 Greenl. on Ev., § 431. His action will be presumed correct, in the absence of showing to the contrary. The bill of exceptions should set out such facts as show an arbitrary, dogmatical assertion of authority in the exercise of his discretion by the judge, or the portions of testimony upon which defendant was deprived of his right of cross-examination, so that this court may be able to see, if at all, how far the defendant's rights were likely to have been prejudiced by the action. Without such a showing, this court could not act advisedly in attempting to revise the ruling, and would not feel authorized to attempt it.

The first ground of defendant's motion for a new trial is, substantially, that some of the jurors who tried the case were Mexicans who did not understand the English language, and could neither read nor write; that they did not understand the charge of the court; and had they done so, would not have consented to the verdict rendered, but would have found defendant guilty of an aggravated assault. Affidavit of these jurors is appended to, and presented in support of this ground of the motion.

It does not appear that the accused either challenged the array of the jury, or any particular jurors, but accepted the jury as impanelled. Nor does it appear that defendant did not know of these supposed disqualifications of the jurors at the time he accepted them. He certainly had the right to have their legal qualifications fully tested, under the statute (Acts 15th Leg. 83, § 26); and there is nothing in the record to show that this right was not accorded him. Having accepted them, he will be held to have waived his right to impeach the organization of the jury, and he could not do so in a motion for a new trial, or in arrest of judgment. *Buie v. State*, 1 Tex. Ct. App. 452; *Hasselmener v. State*, id. 690.

In *Lyles v. State*, 41 Tex. 172, where this subject is discussed, the defendant, *in limine*, moved the court to permit no one to act as a juror who did not understand the English language, which motion was overruled, and nine jurors laboring under this disability were put upon him. Defendant promptly excepted, and it was held that the court erred. In this case, the defendant has placed him-

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self in no attitude to have the matter inquired into or revised. True, he reserved a bill of exceptions to the overruling of his motion for new trial, but that fact—allowing a bill of exceptions to the ruling—was not an admission of the truth of the existence of the grounds upon which the motion was based, but simply admitted and certified the specific fact, alone, that the motion had been overruled. *Smith v. State*, 4 Tex. Ct. App. 626; *Marshall v. State*, 5 id. 273.

[Omitting other matters.]

Judgment affirmed.

HUDSON V. STATE.

(6 Tex. Ct. App. 565.)

Criminal law—construction of statute—“insulting words toward a female relation.”

A statute provided that “insulting words toward a female relation” should be “adequate cause” to reduce a homicide from murder to manslaughter. *Held*, that insulting words of and concerning such female relation who was not present were within the protection of the statute.

CONVICTION of murder in second degree. The opinion states the point.

Boyd & Holman, for appellant.

Assistant Attorney-General Thomas Ball, for the State.

ECTOR, P. J. [Omitting minor matters.]

The fourth assignment of error is, that “the court erred in the eighth paragraph of his charge to the jury.” This assignment presents a question which, we believe, has never before been passed upon by a court of last resort in this State, and upon which there is quite a difference of opinion among many of our best lawyers. In order fairly to present the question here made, we will copy the seventh and eighth paragraphs of the charge, which the court gave as instructions to the jury on the law of manslaughter:—

“7. By adequate cause is meant such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

Insulting words or gestures are not adequate cause, in the legal meaning of said phrase. Insulting words or conduct of the person killed, toward a female relative of the party guilty of the homicide, is adequate cause, provided the killing took place immediately upon the happening of the insulting conduct or words, or as soon thereafter as the party killing may meet with the person killed, after having been informed of such insults, and provided such insulting words or conduct were the real cause of the killing, and produced the state of mind above described in subdivisions 6 and 7 of this charge.

"8. But insulting words of, about, and concerning a female relative who is not present, are not insulting words 'toward' a female relation as used hereinbefore, and would not necessarily be 'adequate cause' as fixed by the law; but if a person used insulting words to another about a female relation of the latter, and in the opinion of the jury the words are such as would commonly produce a degree of anger, rage, or resentment in a person of ordinary temper, sufficient to render the mind incapable of cool reflection, and such condition of mind is thereby produced, and such second person, at the time of such provocation, killed such first person, the act would be manslaughter."

We believe that the first part of the eighth subdivision of the charge of the court was not a correct enunciation of the law, and was well calculated to mislead the jury. In telling the jury "that insulting words of, about, and concerning a female relation who is not present are not insulting words 'toward' a female relative as used herein, and would not necessarily be adequate cause as fixed by the law," we think the court committed an error. In our judgment, the legislature never intended, in subdivision 4 of art. 2254, Paschal's Digest, to restrict the insulting words of the person killed, "toward" a female relative of the party guilty of the homicide, to remarks made to her or in her presence, but intended to include insulting words about a female relative, whether she was present or absent.

Mr. Webster, in his Unabridged Dictionary, gives "toward," when used as a preposition, the following meaning, to-wit: "Toward—1. In the direction to. 2. With direction to; in a moral sense, with regard to, regarding. 3. With ideal tendency to. 4. Nearly." If the legislature had intended that such insulting words must be used by the deceased to or in the presence of the female, in order

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to reduce the killing to manslaughter, some other word than "toward," and one that would have better expressed the idea, would have been used in the statute. It appears clear to us that on the plainest principles of justice and reason, it could make no difference, so far as the provocation is concerned in this instance, whether the deceased told the wife of the defendant that she was a prostitute, or her husband that he had married a prostitute. The extent of the transport of passion, to extenuate the guilt of the homicide, would be as great in the one case as in the other. And in every case when such a defense is relied on to reduce the killing to manslaughter, the jury must be at liberty to determine whether, under all the circumstances, the insulting words were the real cause which provoked the killing. The court did not err in overruling defendant's motion in arrest of judgment.

As this case must be reversed on account of the error in the charge of the court, it is unnecessary to notice the other assignments of error; they will not likely occur on another trial.

The judgment of the District Court is reversed and the cause remanded.

Reversed and remanded.

WALKER V. STATE.

(7 Tex. Ct. App. 245.)

Criminal law — evidence — footprints — compelling prisoner to make.

On the trial of an indictment for murder, the prosecution were allowed to prove that the examining magistrate had compelled the prisoner to make his footprints in an ash heap, and that they corresponded with footprints found at the scene of the crime. *Held*, no error.*

CONVICTION of murder. The opinion states the case.

F. H. Prendergast, for appellant. The first error assigned is that the court should not have allowed George Grimes to testify as to the result of a comparison between tracks found near Munroe's house and a track which the defendant was compelled to make while

*See *State v. Sanders* (68 Mo. 202), 20 Am. Rep. 732.

under arrest. If the defendant "shall not be compelled to give evidence against himself" (Bill of Rights, § 10), how can he be compelled to put the State in possession of any fact which the State says goes to establish his guilt?

In *State v. Graham*, 74 N. C. 646; s. c., 21 Am. Rep. 493; 1 Hawley's Am. Cr. Rep. 182, the officer compelled the prisoner to put his foot in a track found near where the larceny was committed, and testified to the result of the comparison. The court held the evidence competent, and say (which we say is not correct) that it is similar to a defendant wearing a mask to prevent being identified; and *The Albany Law Journal* of December 1, 1877, dissents from the case, and says in that State a woman was charged with having suffered an abortion and was compelled to submit to a medical examination, and the conviction was set aside. In the case of *Stokes v. State*,² Tex. L. J. 243; 5 Baxt. 619; s. c., 30 Am. Rep. 72, the defendant was only requested to give evidence against himself, and the court say that was error. But Walker has been compelled to give evidence against himself, and that evidence has been used to obtain his conviction. In *Stokes v. State*, the State's attorney wanted to prove that the defendant's track would be similar to the tracks found where the crime was committed, and for this purpose brought a pan of mud before the jury and asked the defendant to put his foot in it. This he declined to do, and the judge told the jury that his refusal could not be taken against him. The court say the defendant was asked to give evidence against himself, and reversed the case.

If this defendant can be compelled to make an impression with his foot in order to see if it is similar to the impression made by the foot of the person who committed the crime, then if he were charged with forgery he could be compelled to take a pen and write in order to see if his handwriting was similar to that of the party who had committed the forgery.

It is no answer to say that all the information obtained by this compulsion is true, for then you would be polluting the halls of justice with this maxim of modern ethics—that the end justifies the means.

The law has certain rules by which the guilt of a person is established; and it absolutely forbids that a defendant should be compelled to give evidence against himself.

Attorney-General George McCormick. for the State.

WHITE, P. J. [Omitting other points.]

There is but a single bill of exceptions exhibited in the record, and this was saved to the admission in evidence of proof with regard to foottracks made by defendant in Justice Joiner's office whilst he was under arrest. Just after the discovery of Maj. Munroe's murder, some parties present commenced examining for any signs or evidence left by the perpetrator at the house and around the premises. Footprints were found in the house, at a window, and in a peach-orchard, which were measured by the witnesses, one of whom was George Grimes. The portion of his testimony which was objected to on trial was as follows: "I saw the same measure applied to a track in Judge Joiner's office at Bremond. Joiner made the defendant make his track in the ashes and sand in his office, where a stove had been. The impression made was plain, and it was about the same as tracks made in Munroe's house. The measure was applied to the footprints in Joiner's office, and it was the same in every particular — fitted it exactly."

It is contended that the evidence was incompetent and inadmissible, because it was evidence which defendant was compelled to make and give against himself, in contravention of the tenth section of the Bill of Rights, art. 1 of the Constitution, which declares that one accused of crime shall not be compelled to give evidence against himself.

This identical question was presented in the case of *State v. Graham*, 74 N. C. 646; s. c., 21 Am. Rep. 493. RODMAN, J., delivering the opinion of the court, says: "The object of all evidence is to elicit the truth. Confessions which are not voluntary, but are made either under the fear of punishment if they are not made or in the hope of escaping punishment if they are made, are not received as evidence, because experience shows that they are liable to be influenced by those motives, and cannot be relied on as guides to the truth. But this objection will not apply to evidence of the sort before us. No fears or hopes of the prisoner could produce the resemblance of his track found in the cornfield. This resemblance was a fact calculated to aid the jury, and fit for their consideration." After citing Best on Evidence, § 183, and other authorities, the learned judge proceeds to say further: "If an officer who arrests one charged with an offense has no right to make the prisoner show the contents of his pocket, how could the broken knife or fragment of paper corresponding with the wadding have been found? If, when

a prisoner is arrested for passing counterfeit money, the contents of his pockets are secured from search, how can it ever appear whether or not he has on his person a large number of similar bills, which, if proved, is certainly evidence of *scienter*? If an officer sees a pistol projecting from the pocket of a prisoner arrested for a fresh murder, may he not take out the pistol against the prisoner's consent, to see whether it appears to have been recently discharged? Suppose it to be a question as to the identity of the prisoner, whether a person whom a witness says he saw commit a murder, and the prisoner appears in court with a veil or mask over his face, may not the court order its removal in order that the witness may say whether he was the person whom he saw commit the crime?"

* * * The conclusion reached is thus summed up: "We agree in the opinion that when the prisoner, upon being required by the officer to put his foot in the track, did so, the officer might properly testify as to the result of the comparison thus made.

It is unnecessary to say whether or not the officer might have compelled the prisoner to have put his foot in the tracks, if he had persisted in not doing so." See this case of *State v. Graham, supra*, also reported in full in 1 Am. Cr. Rep. (Hawley) 182, and 21 Am. Rep. 493.

The question here is essentially different from the one before the Supreme Court of Tennessee in *Stokes v. State*, 5 Baxt. 619; s.c., 30 Am. Rep. 72, cited by counsel, where a pan of soft mud was brought into the court-room on the trial, and the prisoner was asked in the presence of the jury to put his foot into it, which he declined to do. The reversal in that case was upon the ground that the prisoner was asked in the presence of the jury to make evidence against himself, and because, the court say, they "are satisfied the jury were improperly influenced thereby. * * * The bringing in of the pan of mud and the request of the attorney-general was improper, and should not have been permitted by the court." *Stokes v. State* is also reported in 2 Tex. L. J. 243.

Judgment affirmed.

WRIGHT V. STATE

(7 Tex. Ct. App. 545.)

Criminal law — evidence of feigned accomplices.

On a trial for felony the principal State's witness claimed to have acquired his knowledge of the offense in the character of a detective and feigned accomplice. *Held*, that the question of his real guilt was properly left to the jury, with instructions as to the nature and credibility of the testimony of accomplices.*

CONVICTION of theft. The opinion states the case.

Pat O'Docharty and W. D. Givens, for appellant.

Assistant Attorney-General Thomas Ball, for the State.

WINKLER, J. The only question presented in the record and discussed in the brief of counsel for the appellant requiring special consideration is this: Is the uncorroborated testimony of a detective of itself sufficient to warrant a conviction? The position of counsel for the appellant is that the testimony of such a witness is that of an accomplice, and that the court should have so charged the jury; that it was error for the court to submit to the jury the question as to whether he had any such guilty participation in the crime of which the defendant was accused as to require such corroboration or not.

The judge who presided at the trial gave the jury the following charge as applicable to the witness who testified against the defendant: "If you believe from the evidence that the witness Holden was present when the animal was taken by Bragg White, if it was taken by him, and aided, assisted, or encouraged said Wright in taking said animal, and his action therein was done with a criminal intent, you must acquit the defendant, unless you find that his evidence is corroborated by other evidence connecting the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense. If, however, you believe said witness was employed as a detective by the State of

* See *Speiden v. State* (3 Tex. Ct. App. 156), 30 Am. Rep. 126, and note, 128.

Texas, and was acting as such in ferreting out crime, and his action with the defendant at the taking of said animal was solely for the purpose of discovering crime, his evidence requires no corroboration. If you believe it sufficient to convict upon, you will receive it and act upon it the same as any other testimony."

We concede that the authorities cited by the counsel in his brief maintain the position that the uncorroborated testimony of an accomplice will not alone be sufficient to warrant a verdict of guilty in any criminal case. This is specially provided for in the Code as follows: "A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." Code Cr. Proc., art. 741.

Whilst it may be admitted that the language of the charge may be obnoxious to criticism, especially that portion which set out the principle that one who participates in the crime committed, with a guilty intent, is an accomplice in the sense requiring corroboration, it is believed that it was sufficient under the proofs to apprise the jury, if they believed from the testimony that the witness participated in the offense for which the defendant was being tried, with a guilty intent to aid the defendant in its perpetration, that then they could not convict the defendant on the testimony of this witness, unless they find "that his evidence is corroborated by other evidence connecting the defendant with the offense committed." This however does not fully meet the question. The charge further instructed the jury, in effect, that if the jury believed from the testimony that the witness Holden in his participation in the transaction was simply acting in the capacity of a detective, and without guilty intent, but solely to aid in ferreting out crime of which the defendant had been suspected, then he did not stand in the relation of one whose testimony required corroboration, but that he stood as any other witness, and subject to have his testimony weighed by the jury as that of any other witness in the case. We are of opinion that the court did not err in submitting the testimony to the jury, or in refusing a new trial on the ground that the verdict depended upon the testimony of this witness.

We are not aware that this precise question has before been presented to any of the courts of last resort in this State. The time

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allowed us for investigation has afforded but few cases in other States. COLE, J., in *State v. McKean*, 36 Iowa, 343; s. c., 14 Am. Rep. 530, 2 Greene's Cr. Rep., in treating of a similar subject, says: "The authorities upon this question are few; indeed there is but one case we have found in which the point was directly ruled. That case is *Rex v. Despard*, 28 How. St. Tr. 346, 387." There was found some difference between *Despard's* case and the one the judge was considering; but the judge, in deciding *McKean's* case, said: "The court left the credibility of the witness, and the weight to be given to his testimony, entirely to the consideration of the jury. Of these they were the proper judges. We do not see how we can interfere with the action of either court or jury." In *People v. Farrell*, 30 Cal. 316, it was held that "the rule that a defendant cannot be convicted of a criminal offense on the testimony of an accomplice, unless the same is corroborated, does not apply to a feigned accomplice." On these authorities we hold in the present case that *first*, the court did not err in submitting to the jury the question as to whether the witness Holden was an accomplice or not; and *second*, that the credibility of the witness being fully submitted to the jury, and they having given full credence to the testimony, the conviction will not be set aside, though resting mainly, if not entirely, on the testimony of a detective. Otherwise, the case is one of conflict of testimony. The writer has great sympathy with the argument of counsel as to the general subject of the testimony of hired detectives and spies upon the conduct of others, but must say the remarks do not apply with full force to the witness in the present case. The judgment is affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

JOHNSON V. MITCHELL.

(50 Tex. 212.)

Negotiable instrument — indorsement of note payable to A. or bearer.

A note payable to A. or bearer was indorsed by A., with an assignment and guaranty to B. *Held*, that B. got title.

ACTION on a note. The opinion states the case. The plaintiff had judgment below.

Samuel J. Hunter, for appellants.

GOULD, A. J. This suit was brought by B. F. Mitchell against appellants, W. L. Johnson and C. R. Bedford, the makers of a promissory note, payable January 1, 1873, to J. W. Crabtree or bearer, and against Crabtree, who had indorsed the note as follows :

“ I hereby assign the within note to S. L. Gilbert for value received, and guarantee the solvency of the makers of said note, 11th of September, 1873.

J. W. CRABTREE.”

The averments of Mitchell's petition as to his right or title to the instrument sued on were, that he was the legal holder and owner of the note ; that Crabtree sold and transferred it to Gilbert, setting out the assignment as indorsed, and that after said transfer, he (plaintiff) purchased the note from Gilbert, who transferred it to

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him by delivery. The only evidence of ownership introduced by Mitchell was the note and indorsement. The defendants had all filed a general denial, but produced no evidence. A jury being waived, the court gave judgment against Johnson and Bedford as principals and Crabtree as guarantee. Johnson and Bedford asked for a new trial, claiming that the evidence was insufficient to support the judgment; and their motion being overruled, they alone have appealed.

It is insisted, on their part, that the production of the note, transferred as it was to Gilbert, did not establish that Mitchell was the legal holder or owner.

As Crabtree does not complain, the sole question is as to the legal effect of possession of a note payable to bearer and indorsed in full by the payee, as against the makers.

Feeling that uniformity of decision, in all cases important, is not least so in questions of commercial law, and failing to find decisions directly in point, we have given the authorities bearing on the question a careful examination.

According to the elementary authorities, a bill or note payable to order and indorsed in blank, so long as the indorsement continues blank, "is in effect payable to bearer." Chitty on Bills (11th ed.), 227; 3 Kent (9th ed.), m. p. 89; Story on Bills, § 60; 2 Pars. on Notes and Bills, 19, note *w*; Edw. on Bills and Notes, 131, 269; 1 Danl. on Neg. Inst., § 693; *Greneaux v. Wheeler*, 6 Tex. 522; *Wethered v. Smith*, 9 id. 625; *Whithed v. McAdams*, 18 id. 553; *Ross v. Smith*, 19 id. 172.

Lord MANSFIELD said, in *Peacock v. Rhodes*, 2 Doug. 636: "I see no difference between a note indorsed in blank and one payable to bearer;" and Chancellor KENT said, in *Conroy v. Warren*: "A note indorsed in blank and one payable to bearer are of the same nature. They both go by delivery, and possession passes property in both cases." 3 Johns. Cas. 263. So "a note payable to the maker's order becomes, in legal effect, when indorsed in blank, a note payable to bearer." Byles on Bills, ch. 7, p. 68; *Brown v. De Winton*, 6 M. G. & S. 376; 60 Eng. Com. Law.

From these authorities, we conclude that Mitchell's possession was at least as satisfactory evidence of his ownership as it would have been had the note been payable to Crabtree or order, indorsed in blank by Crabtree, and then indorsed in full by Gilbert and some one other than Mitchell.

The negotiability of a note payable to bearer is certainly not further restrained by an indorsement in full than would be, by the same indorsement, the negotiability of a note payable to order and indorsed in blank by the payee. But the rule is well settled, that "if a bill be once indorsed in blank, though afterward indorsed in full, it will still, as against the drawer, the payee, the acceptor, the blank indorser, and all indorsers before him, be payable to bearer, though as against the special indorser himself title must be made through his indorsee." Byles on Bills (5th ed.), 109, cited by Pollock in 2 Exch., *infra*; Chitty on Bills, 228, 230 a; 3 Kent, m. p. 90; Story on Prom. Notes, § 139; 2 Pars. on Notes and Bills, 19, 26; *Walker v. McDonald*, 2 Exch. 531, citing *Smith v. Clark*, 1 Peak. N. P. C. 295, and 1 Esp. 180; *Mitchell v. Fuller*, 15 Penn. 270; *Huie v. Bailey*, 16 La. 213; *Little v. O'Brien*, 9 Mass. 423; *Dugan v. U. S.*, 3 Wheat. 172; Edw. on Bills and Notes, 275, citing *Dolfus v. Frosch*, 1 Den. 367; *Savannah National Bank v. Harkins*.

We conclude, then, that however it might have been as against Crabtree, on which point we express no opinion, as against the makers of the note, its production by Mitchell was sufficient evidence of title.

It may be objected that the safe transmission, by mail or otherwise, of notes and bills payable to bearer requires a different rule. The answer is, first, that such a consideration will not justify a departure by the courts from established principles and precedents; second, that what is known as a "restrictive" indorsement stops the currency of negotiable paper. Chitty on Bills, 232; Story on Prom. Notes, § 142 *et seq.*; 2 Pars. on Notes and Bills, 21; 1 Danl. on Neg. Inst., § 698.

Whilst we have disposed of the case on the assumption that Crabtree's transfer was equivalent to an indorsement in full to Gilbert or order, it is not intended to pass upon that question. Looking to the original nature of the note, which was that it should pass by delivery, and following what was long since said to be the settled rule, "that the assignment follows the nature of the thing assigned," it may be questioned whether that indorsement does not receive full effect by treating it as intended to secure Crabtree's liability as guarantor to Gilbert or bearer. See *Edie v. East India Co.*, 2 Burr. 1216; *Lane v. Krekel*, 22 Iowa, 400.

The judgment is affirmed.

Judgment affirmed.

STEELE V. RENN.

(50 Tex. 467.)

Will — forged — title of purchaser under.

A purchaser of lands in good faith from a devisee under a will admitted to probate gets good title, although the will is subsequently annulled as a forgery.*

TRESPASS to try title. The opinion states the case.

Bonner, Priest & Priest, Whittaker & Robertson, for appellants.

E. W. Bush and M. A. Long, for appellees.

MOORE, C. J. This is an action of trespass to try title, brought by appellees December 12, 1872, for the recovery from appellants of lots three and four in block twenty-three, in the town of Rusk, Cherokee county, to which both parties claim title under Casper Renn, deceased, in whom the title is admitted to have been at his death. Appellees claim as the heirs, and appellants as purchasers in good faith from H. K. Joice and wife, who claimed as devisees of Renn.

On the 23d of December, 1864, Casper Renn died in Rusk, Cherokee county, where he had for some years previous resided. In January, 1865, an instrument purporting to be his last will and testament was presented to the court for probate by the parties therein named as executors; said instrument authorized said executors to administer and settle up the estate in accordance with its terms without being subject to the supervision and control of the court. After due notice of the application had been given the execution of the instrument was inquired of by the court, whereupon it was adjudged to be the last will and testament of said Casper Renn, deceased; and the property and effects belonging to his estate were committed to said parties named as executors, to be by them administered under and in pursuance of the authority purported to be given them therein.

On the 3d of March, 1865, said executors made and delivered to

* See *contra*, *Fallon v. Childester* (46 Iowa, 588), 26 Am. Rep. 164.

said Joice and wife a deed for said lots devised to them by said will; and on the 2d of December, 1865, said Joice and wife, in consideration of \$275 paid them by Richard G. Steele, as recited in their deed, sold and conveyed them to said Steele, from whom they were subsequently purchased by appellant Carter.

Appellees, who are brothers and sister to Casper Renn, deceased, were at the date of his death, and most of them seem to be still citizens of Germany. Some time in the summer of 1865 B. Renn, one of the appellees, came to Rusk, Cherokee county, where he has since resided, to look after the estate of his brother on behalf of his brothers and sister as well as himself; and in November, 1866, prior to the sale of the lots from Steele to Carter, suit was instituted by said B. Renn in the name of the brothers and sister, heirs of said Casper Renn, deceased, to set aside and revoke the probate of said will, charging the same to be a false and spurious instrument, and not in fact the will of said Casper Renn, deceased. In 1873 it was finally so determined and adjudged by this court, and its probate ordered to be revoked and annulled.

On the trial, the facts here stated having been proved, appellants introduced evidence tending to prove that they purchased the lots in good faith, and claimed to be entitled to the protection of the court as purchasers for value without notice that said instrument was not the true and genuine will of Casper Renn, deceased, as it purported and had been adjudged to be by its probate; whereupon the court instructed the jury, among other things, as follows: "The plaintiffs have produced in evidence a conclusive judgment setting aside the pretended will of Casper Renn, deceased, and declaring it null and void, and that his heirs at his death were invested with the ownership of all of his estate. When Steele purchased from Joice he took no better title than Joice had, which has been shown to be none at all, and he took the title at his own risk."

If this is a correct view of the law, evidently appellants have no title and have no just cause to complain of the recovery of the lots by appellees. On the other hand, if it is erroneous, as it necessarily controlled the verdict of the jury to the prejudice of appellants, the judgment must be reversed.

The practical importance of the question raised by this charge is obvious. If the views of the court are held to be correct, no title derived from a devisee but may be swept from under the purchaser

at any time, however remote, while the probate of the will is subject to attack. This fact when known must cast a cloud on all such titles, lessen their market value and retard their transfer. On the other hand, if the instruction does not correctly state the law, our probate system affords but slight safeguards to non-resident heirs against perjury and fraud. These considerations induced this court to refrain from a decision of this case for several terms, and to call upon the counsel for a more thorough examination of the law applicable to it than had at first been made by them; but we regret to say that so far they have cited us no case bearing directly upon the point presented, and we have, to a considerable extent, to decide it as an original question.

Appellants insist that they are entitled to protection as innocent purchasers notwithstanding the invalidity of the will from which their title springs. In support of their proposition they refer us to the case of *Jones v. Powles*, 10 Eng. Ch. 310; 3 Myl. & K. 581. But this case merely illustrates the rule of equity protecting purchasers in good faith who get in the outstanding legal title, but leaves unsettled the main difficulty, viz.: Although he may have purchased in good faith, did Steele occupy a better position than Joice and wife would if they had not sold the lots? Unquestionably their title in such event would have fallen with the revocation of the probate of the instrument by which they purport to have been devised to them. *Gaines v. New Orleans*, 6 Wall. 642; *Gaines v. De La Croix*, id. 719. But while our conclusion has not been reached without hesitancy and embarrassment, we think, notwithstanding the damage to which absent and non-resident heirs may thereby be exposed, he does, if he in fact purchased in good faith, and that public policy requires this solution of the question.

An application for the probate of a will is a proceeding *in rem*, and the judgment of the court upon it is binding upon all the world until revoked or set aside. *Hodges v. Bauchman*, 8 Yerg. 186; *Scott v. Calvit*, 3 How. (Miss.) 158; *State of California v. McGlynn*, 20 Cal. 271; 3 Redf. on Wills, 63.

Now it has often been held that acts done under authority, by the judgment of a court having jurisdiction of the estate, even where it is being administered under a forged will, are just as valid and effectual as if the will had been genuine; that a payment voluntarily made to the executor named in a forged will is a valid discharge of the debt. Though the will may be afterward set aside and annulled, the debtor cannot be required to pay the debt a second time.

If the pretended will had required the executors to settle the will of Renn in the probate court, the acts done by them in pursuance of the orders of the court carrying into effect provisions of the will could not be impeached or set aside to the injury of innocent parties, because they have a right to rely upon the validity of the judgment of the court. 5 Monr. 42; 11 Cush. 519; 9 Dana, 41; 9 Penn. St. 234; 6 Port. 243; 13 Gratt. 682.

Is there any difference in respect to the powers of the executors where the purported will directs the settlement of the estate out of the court? By its judgment the court has declared the instrument to be genuine. This judgment is binding upon all the world until reversed or annulled. Must innocent parties, when they act upon the faith of such judgments, do so at the peril of its being subsequently shown to be erroneous? There is evidently a broad distinction in the position of a party claiming to be an innocent purchaser from one who has merely a forged deed, and that of a like purchaser from the devisee in a forged will. In the former case the true owner is neither charged with notice of the forged deed, nor is he in any way committed to or estopped from denying its validity; while in the latter the will is adjudged to be valid by a court of competent jurisdiction, in a proceeding to which the heir is a party. While it is in force the heirs are bound by it, and cannot deny its correctness or dispute the validity of the devise. The purchaser from the devisee is authorized by the judgment to buy from him on the faith of a valid judgment of a court of competent jurisdiction, to which the heirs are parties, by which it has been in effect determined that the estate of the testator vested in the vendor on the testator's death. The heirs being bound by the judgment, they occupy the position of one who has voluntarily parted with or been divested of his title, and then stands by and sees it sold to a purchaser in good faith without a word of complaint. That he afterward asserts his title and has the judgment reversed, or gets a decree cancelling the probate of the will, does not mend the matter.

The purchase has been consummated. If by the subsequent reversal of the judgment he can annul the purchaser's title, he makes an innocent party the victim of his negligence and delay, and all distinction between *bona fide* and *mala fide* purchasers is destroyed.

For the error in the charge of the court the judgment is reversed and the cause remanded.

Reversed and remanded.

BONNER, J., did not sit.

RAINS V. SIMPSON

(50 Tex. 495.)

Judge — civil liability for judicial act.

Justices of the peace, *ex officio* county court, are not liable in a civil action for an alleged wrongful and malicious refusal to approve a collector's bond.*

ACTION for refusal to approve a bond. The opinion states the case. The defendants had judgment below.

J. J. Hill, for appellant, cited Gen. Laws of 1873, p. 124; *Sedgw. on Meas. of Dam.*, ch. 21; *Shearm. & Redf. on Neg.*, ch. 9; *Calder v. Halket*, 2 B. & H. Lead. Crim. Cas. 308, and note, 325; *Shaw v. Brown*, 41 Tex. 446; *Crepps v. Dorden*, 1 Smith's Lead. Cas. 800.

L. D. King, for appellees.

BONNER, A. J. The appellant and plaintiff below, P. P. Rains, as former sheriff of Rains county and *ex officio* collector of taxes, sued the defendants, Levi Simpson and others, as former justices of the peace and *ex officio* county court of said county, for an alleged wrongful and malicious refusal to approve a new bond which they had required of him as such collector, and which had been tendered by him for approval, and had been rejected by them by order entered upon the minutes in open court, to his actual damages, in the loss of commissions, \$1,000, and for exemplary damages.

On the trial the exceptions of the defendants were sustained and the cause dismissed, from which judgment this appeal is presented.

There were both general and special exceptions, but as the record does not show affirmatively any separate action of the court on the latter we will consider the general exceptions only, which present the case of the plaintiff in its strongest aspect. The question, then, for our determination is this: Were the members of the county court liable, personally, in a civil action at the suit of the sheriff for having wrongfully and maliciously rejected his official bond?

* See *Lange v. Benedict* (73 N. Y. 12), 29 Am. Rep. 80, and note, 96.

This question is one of first impression in this court, and we have endeavored to give it due consideration, both in the light of authority and upon principles of sound public policy.

We find for our guidance decisions of the highest courts of last resort. In the case of *Yates v. Lansing*, 5 Johns. 282, the question of the personal liability of judicial officers for official acts was most elaborately considered by Chief Justice KENT, and it was shown that from the time of the Year-books, it was a settled principle and the very foundation of all well-ordered jurisprudence, that every judge, whether of a higher or a lower court, in the exercise of the jurisdiction conferred on him by law had the right to decide according to his own free and unembarrassed convictions, uninfluenced by any apprehension of private prosecution.

The learned chief justice considered this as a sacred principle which had a deep root in the common law, and said that "No man can foresee the disastrous consequences of a precedent in favor of such suit. Whenever we subject the established courts of the land to the degradation of a private prosecution we subdue their independence and destroy their authority. Instead of being venerable before the public they become contemptible, and we thereby embolden the licentious to trample upon every thing sacred in society, and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty." *Id.* 299. This case, after full argument, was affirmed by the Court of Errors of New York. 9 Johns. 395.

The principles upon which these decisions rest lie at the very foundation of all good government — "the greatest good to the greatest number." As has been well said in this connection by an eminent judge: "In the imperfection of human nature it is better that an individual should occasionally suffer a wrong than the course of justice should be impeded and fettered by constant and perpetual restraint and apprehension on the part of those who are to administer it." Lord TENTERDEN, C. J., in *Garnett v. Ferrand*, 6 B. & C., cited in *Cooley on Tax.*, 552, note 1.

This privilege is not intended so much for the protection of the judge as an individual, as for the protection of society, by preventing the scandal and embarrassment which would follow, should the judicial department, which represents one of the most sensitive and vital parts of sovereignty, be subjected to the separate prosecutions of private parties. As a delegated part of this sovereignty,

the actions of the judiciary represent and affect the public ; and if there is in the judge presiding such a departure from that true dignity and spotless purity which should characterize the high trust and confidence reposed, he is subject to be arraigned, punished and removed from office by indictment or impeachment, at the suit of that power from which he derives his authority. As in many other cases by the common law, the private injury is merged into the public wrong, and by our laws protection is intended to be given to society, and indirectly to the individual, by the removal from office and punishment of the offender. Const. 1869, art. 5, § 10 ; 2d. Sess. 14th Leg. 48.

From the very necessity of the case, this immunity from private liability extends not only to negligent, but willful and malicious judicial acts. As said by Chief Justice SHAW in *Pratt v. Gardner*, 2 Cush. 69 : " If an action might be brought against the judge by a party feeling himself aggrieved, the judge would be compelled to put in issue facts in which he has no interest, and the case must be tried before some other judge, who in his turn might be held amenable to the losing party, and so on indefinitely. If it be said that it may be conceded that the action will not lie unless in a case where a judge has acted partially or corruptly, the answer is, that the losing party may always aver that the judge has acted partially or corruptly, and may offer testimony of bystanders or others to prove it ; and these proofs are addressed to the court and jury, before whom the judge is called to defend himself, and the result is made to depend not upon his own original conviction (the seclusion of his own mind in the decision of the original case), as by the theory of jurisprudence it ought to do, but upon the conclusion of other minds, under the influence of other and different circumstances."

To the same effect is *Weaver v. Devendorf*, 3 Den. 117, in which it is said by BEARDSLEY, J. : " But I prefer to place the decision on the broad ground that no public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which prompted it. Such acts, when corrupt, may be punished criminally, but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty. The rule extends to judges from the highest to the lowest ; to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power."

That able jurist, Judge COOLEY, in a valuable contribution on this subject in 3 Southern Law Review (N. S.), 547, says: "But our own view is, that the doctrine that a public officer, acting within the limits of his jurisdiction in the discharge of a discretionary duty, can be held liable upon an assumption that he has acted willfully or maliciously, is an exceedingly unsatisfactory and dangerous one; and that those decisions are safest and most consonant to public policy which deny it altogether. Motives are not always readily justified to the public, even in cases where they have been purest; and the safe rule for the public is that which protects its officers in acting fearlessly, so long as they keep within the limits of their legal discretion;" — citing in note 26, *Sage v. Lanrain*, 19 Mich. 137; *Cooley on Tax*. 552. To the same effect are *Shearm. & Redf. on Neg.* 157; *Wilson v. Mayor, etc.*, 1 Den. 597.

It remains but to inquire whether the alleged wrongful and malicious act on the part of the county court was such a judicial act as would protect from liability at the suit of a private party.

By section 20 of article 5 of the Constitution of 1869, then in force, the justices of the peace of the county constituted a court, having the same jurisdiction formerly exercised by the commissioners' court and police court, which constituted the county court for county business; and by section 9 the district clerk was *ex officio* clerk of the police or county court. By act of the 13th legislature, 147 section 32, this county court had the jurisdiction both to require of the sheriff, as collector, a new bond, and also to approve or reject it.

The application of the principle of immunity from private suit has been a source of difficulty, the practical solution of which depends upon whether the given act was ministerial or judicial. As a general rule, in the former case the action will, and in the latter it will not, be sustained.

The distinction between the two is thus defined: "Where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial; but where the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial." *Commissioner v. Smith*, 5 Tex. 471; *Arberry v. Beavers*, 6 id. 467.

Perhaps as safe criterion as any other, to ascertain whether a private suit would or would not lie, is to adopt the rule which governs in cases in which a mandamus would or would not be granted.

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Mr. High, in his work upon Extraordinary Legal Remedies, says: "But the most important principle to be observed in the exercise of the jurisdiction by mandamus, and one which lies at the very foundation of the entire system of rules and principles regulating the use of this extraordinary remedy, is that which fixes the distinction between duties of a peremptory or mandatory nature and those which are discretionary in their character, involving the exercise of some degree of judgment on the part of the officer or body against whom the mandamus is sought. This distinction may be said to be the key to the extended system of rules and precedents forming the law of mandamus." (§ 24.)

"Thus, where it is made the duty of a clerk of a court to approve the bonds of all county officers, the act of approval is considered so far judicial in its nature that mandamus will not lie to control the judgment of the clerk as to the approval of the bond presented." (§ 46.)

"And where the court has passed upon and adjudicated the question of the sufficiency of the bond in a judicial proceeding, mandamus will not lie." (§ 164.)

"And where certain town officers are intrusted by law with the power of approving the sufficiency of sureties upon the bonds of town constables and of fixing the amount of the bonds, they will not be required by mandamus to approve a particular bond tendered." (§ 326.)

The action, then, of the county court being a judicial act in the exercise of the jurisdiction conferred by statute, the exceptions of the defendants were properly sustained, and the judgment below is accordingly affirmed.

Judgment affirmed.

KELLER V. CITY OF CORPUS CHRISTI.

(50 Tex. 614.)

Constitutional law—destroying private property to prevent conflagration—municipal corporation—liability for act of fire department.

The destruction of private property by the fire department of a city, to stay a conflagration, is not such an act as will sustain an action for damages against the city at common law, and is not a taking of private property for public use, within the sense of the Constitution; and if any remedy is provided by law it must be pursued in the defined mode. (*See note, p. 618.*)

ACTION for damages for the destruction of a dwelling-house. The opinion states the facts. The defendant had judgment below.

F. E. McManus, for appellant.

McCampbell & Givens, for appellee.

BONNER, A. J. The plaintiff brought suit against the city of Corpus Christi for \$1,500 damages, being the alleged value of a dwelling-house and appurtenances owned by him in that city and destroyed by a hook and ladder company, constituting a portion of its fire department, on the 8th of October, 1877, for the purpose of preventing the spread of a fire. The property was thus destroyed without the consent of the owner, and without compensation being made to him, either before or after its destruction. It is alleged in plaintiff's petition that the hook and ladder company were engaged in the course of their regular employment as agents of the city, under the direction of the acting chief engineer of the fire department, and with the concurrence of the mayor, when they entered and destroyed his dwelling-house and appurtenances.

Defendant demurred, denying any cause of action on the part of plaintiff. The court sustained the demurrer, and the plaintiff declining to amend, the cause was dismissed. Plaintiff gave notice of appeal and assigns as error—

1. The District Court erred in sustaining the defendant's demurrer.

2. The District Court erred in dismissing this suit.

The city of Corpus Christi was organized under the general law regulating the incorporation of cities of one thousand inhabitants or over. Laws of 1855, pp. 144, 145.

Section 116 provides that the city council shall have power to organize fire, hook and ladder, hose and axe companies fire brigade, etc., and that they, with such assistant engineers as may be provided for, and the chief engineer, shall constitute the fire department of the city; that the engineers shall be chosen in such manner as the fire department may determine, subject to the approval of the city council, who shall define the duties of said officers; that all of said officers so elected and approved shall be commissioned by the mayor and be governed by the ordinances of said city relating to the fire department, and that their powers and duties shall be prescribed and defined by the city council.

Section 117 provides that when any building in the city is on fire it shall be lawful for the chief or acting chief engineer, with the concurrence of the mayor, to direct such building, or any other buildings which they may deem hazardous and likely to take fire and communicate to other buildings, to be torn down or blown up and destroyed ; and that no action shall be maintained against any person or against the city therefor ; but any person interested in any such building so destroyed or injured may, within six months, and not thereafter, apply in writing to the city council to assess and pay the damages he has sustained, and if the city council and the claimant cannot agree on the terms of adjustment, then the application of such claimant shall be referred to three commissioners, who shall be qualified voters and owners of real estate in the city, one to be appointed by the claimant, one by the city council, and one by both. They shall be sworn faithfully to execute their duty according to the best of their ability ; shall have power to subpoena and swear witnesses, and shall give all parties a fair and impartial hearing, and give notice of time and place of meeting ; they shall be qualified voters and owners of real estate in the city ; shall take into account the probabilities whether the building would have been destroyed by fire if it had not been so pulled down or destroyed ; and may report that no damage should equitably be allowed to said claimant. Whenever a report shall be made and finally confirmed for the appraising said damages, a compliance with the terms thereof by the city council shall be deemed a full satisfaction of said damages.

The judgment in this case is sought to be reversed under section 17 of the Bill of Rights in the Constitution of 1876, which reads as follows : "No person's property shall be taken, damaged, or destroyed or applied to public use, without adequate compensation being made, unless by the consent of such person ; and when taken, except for the use of the State, such compensation shall be first made or secured by a deposit of money."

This provision as to the deposit of money in advance was evidently intended more particularly to provide speedy adequate compensation for property taken in the exercise of the sovereign right of eminent domain, rendered more frequent by the rapidly-increasing demand for railroads and other works of public improvement.

There is, however, a distinction between the exercise of the right of eminent domain, and that of a police regulation to meet an im-

pending peril, by the destruction of an adjacent building to prevent the spread of fire. The one can await the forms and tardiness of the law; the other is governed by a necessity which knows no law. Delay in the latter case may be certain destruction.

To await the appointment of commissioners, the appraisal of the property, and the payment of the money, is, in cases of eminent domain, doubtless a wholesale regulation, but which, in a case like the one now before court, would be wholly impracticable and could not have been intended by the provision under consideration. Cooley on Const. Lim. (3d. ed.) 572, 526, and note 3, and authorities cited; 1 Dill. on Mun. Corp., § 93; 2 id., § 756. It is said by Clarendon that such unwise delay on the part of the lord mayor of London caused half that city to be burned in the great conflagration of 1665.

In the elaborate case of *Russell v. Mayor of New York*, 2 Den. 461, it is held that the authority conferred by statute upon the mayor to order such destruction of buildings is not a grant of the right of eminent domain, and is not, therefore, within the constitutional guaranty of compensation.

The plaintiff further contends that the action complained of was not the exercise of such a public power as would at common law exempt the corporation from liability, but was one of strictly corporate powers, for which the city should make compensation.

In the case of *Peck v. City of Austin*, 22 Tex. 263, in discussing the question of the powers of a municipal government, it is said: "The exertion of its powers by its constituted authorities in prescribing rules of police, * * * is but a mode of exerting the power of the government of the State within the limits of the city. It is a government within a government. Still they are the same; the one being the execution of the will of the other, within certain established boundaries of power and in a certain locality."

The same principle of a dual government is applied to that of our Federal Union in the case of *United States v. Cruikshank*, 2 Otto, 542.

In the leading case of *Hafford v. City of New Bedford*, 16 Gray, 302, in which the plaintiff claimed damages for injuries by the horse carriage belonging to the fire department, under the management of the city authorities, from negligence of the fire company, it was held, that "where a municipal corporation elects or appoints an officer in obedience to an act of the legislature to perform a public

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service in which the city or town has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants of the community, such officer cannot be regarded as a servant or agent for whose negligence or want of skill in the performance of his duties a town or city can be held liable." To the same effect is the subsequent case of *Fisher v. Boston*, 104 Mass. 87; s. c., 6 Am. Rep. 196.

This principle is recognized by this court in *City of Navasota v. Pearce*, 46 Tex. 525.

A "public use" is one which concerns the whole community in which it exists, as contradistinguished from a particular individual or numbers of individuals. *Gilmer v. Lime Point*, 18 Cal. 251.

We are of opinion that the destruction of the property complained of was for a public use, and not such private corporate use as would authorize a suit at common law. *Fisher v. Boston*, 104 Mass. 93; s. c., 6 Am. Rep. 196.

To what extent, then, was the defendant, as a municipal corporation, liable?

At common law, in cases of this sort, no such liability attached. 2 Dill. on Mun. Corp., §§ 756, 757. Lord COKE says: "For the Commonwealth a man should suffer damage, as for the saving of a city or town a house shall be plucked down if the next be on fire. This every man may do without being liable to an action." *Mouse's case*, 12 Coke, 13, 63.

To meet this hardship to the owner, the statute of incorporation under consideration was passed, providing compensation for the destruction of the property, under certain safeguards. Certain named agents, with discretionary powers judicial in their nature, were constituted judges of the emergency, and it was not left to the hasty action of perhaps inconsiderate individual parties.

An effective and speedy remedy was given to adjust and make compensation for the loss. This is all that the law requires. *Cooley's Const. Lim.* 559; *Railroad Co. v. Ferris*, 26 Tex. 588.

Such suit being a permissive one, authorized by statute against a quasi-sovereignty, the statutory remedy alone can be pursued. 2 Dill. on Mun. Corp. 759; *Cooley's Const. Lim.* 561.

The plaintiff's right of action, if any he had, should have been pursued under the statute; and for the alleged failure of the

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defendants to appoint a commissioner, he should have applied for a mandamus.

The plaintiff neither by the common law nor the terms of the statute being authorized to maintain this suit, the judgment below is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—As to the liability of a city for injuries by the act of negligence of its fire department, see also *Greenwood v. Louisville*, 13 Bush, 226; s. c., 25 Am. Rep. 263.

In *Smith v. City of Rochester*, 76 N. Y. 506, defendant's common council appointed a committee to make arrangements for the celebration of the centennial anniversary. The committee directed the fire department to be in front of the city hall at midnight of December 31, 1875. One of the defendant's hose carts, which was being driven rapidly and negligently along a street on its way to the place so designated, ran over the plaintiff and injured him. In an action to recover the damages, held, that the calling out of the hose cart for such purpose was not authorized and defendant was not liable; that the fact that the city owned the horses and hose cart did not make it responsible for the negligent acts of its servants having charge and control of them, when using them in a service not of a public nature, and not authorized by law; and that assuming that defendant had authority to call out the fire department for the purpose stated, it was not liable. The court said:

The doctrine is well settled that municipal corporations are within the operation of the general rule of law, that the superior or employer must answer civilly for the negligence or want of skill of an agent or servant in the course of their employment, by which another is injured. It is essential, however, to establish such a liability that the act complained of must be within the scope of the corporate powers, as provided by charter or positive enactment of law. If the act done is committed outside of the authority and power of the corporation as conferred by statute, the corporation is not liable, whether its officers directed its performance, or it was done without any express direction or command. It is *ultra vires*, and cannot be made the basis of an action for damages for that reason. These general principles are fully sustained by the authorities. See Dill on Mun. Corp., §§ 766, 767, and authorities cited.

The liability of the defendant is sought to be maintained upon the ground that, although the defendant's horses and hose cart were purchased and designed for public service in the fire department, and were generally employed in that service, it was competent for the defendant to employ them in some other service, not of a public, but purely of a private character, so as to render the defendant liable for damages arising from their negligence. This position rests upon the ground that the corporation is liable whenever it uses the property in a service which is not of a public nature authorized by law, and its orders impose upon servants who have the charge and control of such property the duty of obedience, and render the corporation responsible for the negligent misconduct of the servant as much as that of any other superior, or as for any other malfeasance.

We are referred to some authorities which, it is claimed, uphold the doctrine contended for; but we think that they do not sanction any such principle, as is manifest from an examination of the same. In *Eastman v. Meredith*, 36 N. H. 285, the action was for an injury caused by the giving away of the flooring of a town-house erected by the town, which was imperfectly constructed; and it was held that no action would lie against the town. The dictum of PERLEY, C. J., in the opinion, as to the liability of corporations for private injuries caused by improper management, does not go to the extent of holding that they are liable for acts done by its officers or managers beyond the scope of the powers conferred by law; nor was it intended, we think, to hold that, in the latter case, the corporation was liable when the property was not employed for the purposes and objects for which it was designed. So also the remarks in *Bailey v. Mayor*, 3 Hill 331, of NELSON, C. J., which are cited to the effect that municipal corporations, in their private character as owners and occupants of land, must be regarded the same as individual owners, and dealt with accordingly, must be restricted, I think, to apply only to cases where

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the officers do not exceed their powers. In the case of *Nuert v. City of Boston*, 120 Mass. 338, where the corporation was held liable for damages occasioned by the negligent suspension of a telegraph wire for the use of the fire department, the wire was for the benefit of and used by the corporation, attached to a building belonging to the city, and was owned and maintained for the use of the fire department. It had also caused or authorized its removal, and hence the injury occurred while the city had control over it and its agents were acting by its authority. In *Lee v. Village of Sandy Hill*, 40 N. Y. 442, the town officers were acting under a resolution of the board of trustees to remove obstructions from the street. They made a mistake and committed a trespass, but acted in entire good faith in the performance of a public duty. As they exceeded their powers while engaged in an act lawful in itself, it was held that the corporation was liable, whether the trustees were regarded as mere agents of the corporation, or the trespass was deemed the act of the corporation itself. The case differs from one where there is an absence of authority from the beginning and the agents were acting entirely beyond their powers.

The rule laid down in *Dillon on Corporations*, § 780, that municipal corporations are liable for the improper management and use of property, in the same manner as private corporations and natural persons, must be regarded as relating to acts done which are lawful in themselves, where a liability is created by reason of the result which flows from the manner in which such acts are performed, or for a neglect of duty in the lawful care and management of the public property, and not to cases where there is no authority whatever to bind the corporation, and the injury done is caused by an act which is not sanctioned by law. The remarks cited from *Jewett v. City of New Haven*, 38 Conn. 386; s. c., 9 Am. Rep. 382, that where the question is whether the principle of *respondet superior* applies to a municipal corporation, it should distinctly appear, in order to hold them liable, that the service in which the party doing the mischief was engaged at the time was private and not public, were not required for the decision of the case; and if they can be considered as sustaining the doctrine contended for, cannot be regarded as sound law. No reported case sustains the principle, that when the common council of a municipal corporation exceed the powers conferred by the charter of the city they represent, by using the property of the city, as was done in this case, for purposes not recognized by law, the corporation is answerable for negligence in the management of such property. Such a rule would place in the hands of the members of the common council of a municipal corporation a power to create liabilities of the tax payers, which is without any precedent or authority of law, and which might be liable to great abuse. The decisions of the courts are, we think, in a contrary direction, and the cases establish, beyond question, that to authorize the conclusion that the order to the driver of the hose cart was justified by the common council, it should appear that there was express authority in the charter, or that it was done in pursuance of some general authority to act for the corporation in reference to the matter. The rule on the subject is well stated in the opinion of SHAW, C. J., in *Thayer v. City of Boston*, 19 Pick. 518, as follows: "As a general rule, the corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*; it must further appear, that they were expressly authorized to do the acts, by the city government, or that they were done *bona fide* in pursuance of a general authority to act for the city, on the subject to which they relate; or that, in either case, the act was adopted and ratified by the corporation." This rule is upheld in *Lee v. Village of Sandy Hill*, *supra*. In the opinion of the court, as well as in other decisions. See *Mayor v. Bailey*, 2 Den. 433; *Buffalo and Hamburg Turnpike Co. v. City of Buffalo*, 58 N. Y. 639; *Anthony v. Inhabitants of Adams*, 1 Metc. 284; *Mayor v. Cunliff*, 2 Comst. 165; *Ham v. Mayor*, 70 N. Y. 479; *Morrison v. Lawrence*, 98 Mass. 219. The case last cited is directly in point. The action was for an injury sustained by the plaintiff's intestate by the negligent firing of a rocket by the defendant's servant. A resolution had been passed by the common council under a statute authorizing the celebration of the Fourth of July, and the yeas and nays were not taken, as required by law; and it was held, upon this ground, that there was no claim against the corporation, without passing upon the question whether the city could be held liable, even if the purchase of the fireworks was duly authorized. If the corporation would not be liable, under such circumstances, no liability would be incurred in the case at bar, where there is an entire want of authority. If it had power to order the driver of the hose cart, it could only do so in accordance with the statute granting such power; and

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if it had no such power, the order was clearly void, and the corporation was not liable for the consequences arising from its being carried into effect.

In this case, no power was conferred upon the common council to employ the hose cart of the corporation for any such purpose; nor do we think that it could be justified, in pursuance of any general authority relating to the subject.

[Omitting a statutory consideration.]

Assuming, however, that the common council, in making an order for a midnight parade of the fire department to celebrate the centennial anniversary of the nation, had authority under the provisions last cited, the difficulty in maintaining the plaintiff's action is the well-settled rule, that a municipal corporation is not liable for the negligence of firemen while engaged in the line of their duty. Dill. on Mun. Corp., § 774; *Hofford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87; s. c., 6 Am. Rep. 196; *Jewett v. City of New Haven*, 38 Conn. 368; s. c., 9 Am. Rep. 382; *O'Meara v. Mayor*, 1 Daly, 425.

The exemption from liability, in most of the cases last cited is placed upon the ground that the service is performed by the corporation for the public good, in obedience to law, in which it has no particular interest, and from which it derives no particular benefit in its corporate capacity; that the members of the fire department are not the agents and servants of the city, for whose conduct it is liable, but act as officers charged with a public service, for whose negligence, in the discharge of official duty, no action lies against the city, and the maxim of *respondet superior* has no application.

It follows that the common council exceeded its power, in requiring that the fire apparatus and hose carts belonging to the city should be driven along the streets at midnight, and the negligence of the driver, in causing the injury to the plaintiff, was an act for which the defendant was not responsible.

RAPALLO, ANDREWS and EARL, JJ., dissenting.

See also *People ex rel v. Buffalo*, ante, p. 337.

The following is an abstract of *Bowditch v. City of Boston*, Supreme Court of the United States, October term, 1879: A statute of Massachusetts provides in case of a fire in a city, three designated officers may direct any house or building to be pulled down in order to prevent the spreading of the fire, and in such case if it is the means of stopping the fire, the city shall be liable for the value of the building. Held, that the statute gave a bounty which could not have been claimed before, and (following the Massachusetts decisions) that in order to charge the city the case must be clearly within the statute. *Taylor v. Plymouth*, 8 Metc. 465; *Ruggles v. Nantucket*, 11 Cush. 436. At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner. In the case of *The Prerogative*, 12 Co. 13, it is said: "For the Commonwealth a man shall suffer damage, as for saving a city or town a house shall be plucked down if the next one be on fire; and a thing for the Commonwealth every man may do without being liable to an action." There are many other cases besides that of fire—some of them involving the destruction of life itself—where the same rule is applied. "The rights of necessity are a part of the law." *Republic v. Sparhawk*, 1 Dall. 366. See also *Mouse's case*, 12 Co. 63; 15 Vin., tit. Necessity, § 8; 4 T. R. 794; 1 Zab. 248; 3 Id. 591; 25 Wend. 173; 2 Den. 461. In these cases the common law adopts the principle of the natural law and finds the right and the justification in the same imperative necessity. *Burlem*, 145, § 6; id. 159, ch. 5, §§ 24-29; *Puffendorf*, B. 2, ch. 6.

PEISER V. PETICOLAS.

(50 Tex. 638.)

Mortgage of chattels — retention of property by mortgagor with power to sell in course of trade.

A chattel mortgage of a stock of goods and all additions thereto, under which the mortgagor, with consent of the mortgagee, retains possession and sells in the usual course of trade, and substitutes other goods, without applying the proceeds to the mortgage debt, is fraudulent in law as to subsequent creditors, although the mortgage is recorded and the transaction is in good faith.

SEQUESTRATION of mortgaged goods. The opinion states the point.

Lackey & Slayton, for plaintiffs in error. 1. A mortgage upon a stock of goods, the mortgagor remaining in possession thereof, with full authority to sell the same in the ordinary course of business, and which does not require the proceeds of sale to be used in discharge of the mortgage debt, is void. *Robinson v. Elliott*, 22 Wall. 513; *Addington v. Etheridge*, 12 Gratt. 436; *Lang v. Lee*, 3 Rand. 410; *Divver v. McLaughlin*, 2 Wend. 596; *McLachlan v. Wright*, 3 id. 348; *Wood v. Lowry*, 17 id. 492; *Edgell v. Hart*, 9 N. Y. 213; *Gardner v. McEwan*, 19 N. Y. 123; *Russell v. Winne*, 37 id. 591; *Putnam v. Osgood*, 52 N. H. 148; *Ranlett v. Blodgett*, 17 id. 305; *Collins v. Myers*, 16 Ohio, 547; *Freeman v. Rawson*, 5 Ohio St. 1; *Chophard v. Bayard*, 5 Minn. 533; *Horton v. Williams*, 21 id. 187; *Steinert v. Deuster*, 23 Wis. 136; *Bishop v. Williams*, 18 Ill. 101; *Barnet v. Fergus*, 51 id. 352; *Walter v. Wimer*, 24 Mo. 63; *Stanley v. Bunce*, 27 id. 269; *Billingsley v. Bunce*, 28 id. 547; *Lodge v. Samuels*, 50 id. 204; *Hower v. Geesaman*, 17 S. & R. 251.

2. A mortgage upon goods to be acquired after the date of the mortgage is void as to creditors, unless it be shown that such goods were bought with money obtained through the mortgage or by the proceeds of mortgaged property sold. *Robinson v. Elliott*, 22 Wall. 513; *Moody v. Wright*, 13 Metc. (Mass.) 17; *Edgell v. Hart*, 9 N. Y. 213; *Collins v. Myers*, 16 Ohio, 547; *National Bank v. Ebbert*, 2 South. Law Rev. (old series) 175; *Phelps v. Murray*, 2 Tenn. Ch. 746; *Levy v. Welsh*, 2 Edw. Ch. 438; 2 Hill on Mort. 337-342.

A. B. Peticolas, for defendants in error. 1. A mortgage upon a stock of goods, duly recorded, given to secure a note for the purchase-money of the goods, payable one day after date, the mortgagor remaining in possession thereof and selling the same in the ordinary course of trade, which mortgage does not by its terms require the proceeds of sale to be used in discharge of the mortgage debt, is never void where there are no subsisting creditors of the mortgagor. *Paschal's Dig.*, § 3276; *Bryant v. Kelton*, 1 Tex. 415; *Baldwin v. Peet*, 22 id. 708; *Robinson v. Martel*, 11 id. 155; *Brett v. Carter*, 2 Lowell, 458; *Barnard v. Norwich*, 4 Bank. Reg. 463; *Hughes v. Cory*, 20 Iowa, 399; *Gay v. Bidwell*, 7 Mich. 520; *Briggs v. Parkman*, 2 Metc. (Mass.) 258; *Jones v. Huggefords*, 3 id. 515; *Barnard v. Eaton*, 2 Cush. 294; *Cobb v. Farr*, 16 Gray, 597; *Mitchell v. Winslow*, 2 Story, 630; *Abbott v. Goodwin*, 20 Me. 408; *Robinson v. Elliot*, 22 Wall. 513.

2. A mortgage upon after-acquired property is not void; and if due notice of the intent of the mortgagor to render after-acquired goods liable is given by the registry of the mortgage, a subsequent creditor cannot attack it successfully unless he shows an express intent to defraud on the part of the mortgagor and mortgagee, or some concealment, deceit, or misrepresentation on their part. *Paschal's Dig.*, art. 4994; *Cook v. Steel*, 42 Tex. 53; *McGee v. Fitzer*, 37 id. 27; *Butt v. Ellett*, 19 Wall. 544; *Pennock v. Coe*, 23 How. 117; *Galveston Railroad v. Cowdry*, 11 Wall. 480; *Dunham v. Railroad Co.*, 1 id. 254.

BONNER, A. J. The lien claimed by the plaintiff below, *A. B. Peticolas*, must arise from his mortgage, and not from the sequestration, which is merely a judicial deposit. *Fowler v. Stonum*, 6 Tex. 72.

The principal question necessary for the decision of this case involves the legal effect, as to third parties, of a mortgage upon a stock of goods, where the mortgagor retains possession, and with the knowledge and consent of the mortgagee sells them in the usual course of trade, and applies the proceeds to replenish the stock and not to the payment of the debt.

This feature of the case as presented is one of first impression in this court, and we have endeavored to give it that careful consideration and patient investigation of the authorities which its great practical importance demands.

The difficulty is not so much in finding numerous adjudications of the highest courts of last resort upon the question, as in adopting that line of decisions which seems most in consonance with public policy, reason, and justice.

At least ever since the celebrated *Twyne's* case, 3 Co. 80, no subject, perhaps, has occasioned more discussion and diversity of judicial opinion than the questions: What constitute badges of fraud sufficient to avoid the conveyance of a debtor? and whether they are conclusive presumptions of law to be decided by the court, or are mere *prima facie* presumptions of fact to be considered by the jury.

As has been said, the conflicting decisions upon these questions cannot be reconciled by any process of reasoning or on any principle of law. We have neither the time nor inclination to enter fully into the contest upon this great battle-field of judicial strife, but shall content ourselves to adhere to the tendency of our own decisions, so far as they may be analogous, and where we have not this aid, to adopt that line of decisions which seems best to comport with sound public policy.

One of the main points decided in *Twyne's* case was to make it a badge of fraud for the debtor to continue in possession of the property and use it as his own, as by reason thereof he could trade and traffic with others and defraud and deceive them.

Our statute of frauds contains a provision for registration which in its legal effect is equivalent to notice of the conveyance which possession by the mortgagee would give, and thus virtually closes the door to an avenue which formerly occasioned much litigation. As said by a learned court in speaking of a similar statute, it "is a substitute for, and takes the place of and repeals, all those imputations of fraud which would arise from the retention of possession by the grantor." *Bullock v. Williams*, 16 Dick. 33, as quoted with other authorities in *Hughes v. Cory*, 20 Iowa, 403. In this last-named case it is held that mere retention of possession, where the instrument is recorded, is no longer either *per se* fraudulent or a badge of fraud in law. It may be a circumstance with others to prove fraud in fact.

This would apply with additional force in cases of mortgages, as the possession remaining with the mortgagor is consistent with the purposes of the instrument.

But as held by the Supreme Court of the United States in *Robinson v. Elliott*, 22 Wall. 513, and by several State courts, the effect

of the statute is not to make a recorded mortgage *prima facie* valid, which, prior to the statute, would have been held fraudulent in law; and it does not protect a mortgage from those stipulations which at common law would otherwise be deemed fraudulent.

One of these stipulations would be the right of the mortgagor to remain in possession of goods and sell them in the usual course of trade.

It is believed that there should be a marked and well-defined distinction, upon reason and public policy, drawn between a mortgage with power simply to retain possession, and one with power to retain possession and dispose of the property as though the absolute title and right of disposition still belonged to the mortgagor.

It is not claimed — and the high character of the parties to the contract would repel the presumption — that in the transaction under consideration any fraud in fact was intended, and the case will be disposed of under the legal presumptions of fraud arising under the testimony.

Fraud in law, or constructive fraud, is defined to be “such acts or contracts as although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore are prohibited by law as within the same reason and mischief as acts and contracts done *malo animo*.” 1 Story’s Eq. Jur., § 258; *McKibbin v. Martin*, 64 Penn. St. 356; s. c., 3 Am. Rep. 588.

The decisions of this court under our statute, which requires questions of fact to be submitted solely to the jury, leave all questions of fraud in fact to their determination. *Bryant v. Kelton*, 1 Tex. 415; *Briscoe v. Bronaugh*, id. 326; *Kerr v. Hutchins*, 46 id. 384.

When, however, well-defined legal fraud is shown upon the face of the instrument itself without a resort to extrinsic testimony, then, as in any other contract which is expressly illegal or contrary to public policy, it is the duty of the court to construe and declare its legal effect. *Baldwin v. Peet*, 22 Tex. 708; *Bailey v. Mills*, 27 id. 434; *Robinson v. Elliott*, 22 Wall. 513; *Collins v. Myers*, 16 Ohio St. 547.

It is held by the Supreme Court of the United States, in the

above case of *Robinson v. Elliott*, and by numerous well-considered decisions of the State courts, that the retention of possession of a stock of goods by a mortgagor, though the instrument be recorded, with power in him to sell the same in the usual course of trade without applying the proceeds to the mortgage debt, but to substitute other goods, is fraudulent in law, without regard to the good faith in fact of the transaction. Bump on Fraud. Con. 123-130; Herm. on Chat. Mort., ch. 10, and numerous authorities cited in notes; 2 South. Law. Rev. (N. S.) 731.

These decisions are based upon the propositions that such instruments are void as being against public policy and inconsistent with the true purposes of a mortgage, which, either before or after condition broken, is but a mere security for the debt, and which is intended for the ultimate benefit of the creditor, and not of the debtor; and that a mortgage with such power of sale is but a reservation for the use and benefit of the debtor, and but a mere expression of confidence, as there can be no real security where there is no certain lien.

Perhaps the most pointed reasoning to sustain this proposition is found in *Collins v. Myers*, 16 Ohio St. 547, from the able opinion in which case we quote :

“The object of a mortgage is to obtain a security beyond a simple reliance on the honesty and ability of the debtor to pay, and to guard against the risk of all the property of the debtor being swept off by other creditors, by fastening a specific lien upon that covered by the mortgage. But a mortgage with possession and power of disposition in the mortgagor is nothing at last but a reliance upon the honesty of the mortgagor, and in fact is no security, as it is within the power of the mortgagor, at any moment, to defeat the mortgage lien by an entire disposition of the whole property covered by the mortgage. Such a mortgage, then, is no security so far as the debtor is concerned, and is of no benefit except as a ward to keep off other creditors. The very nature of a mortgage is to fasten a lien upon specific property; and the courts have gone far enough when they have permitted an honest possession in the mortgagor. * * * But in this case there is no specific lien, but a floating mortgage, which attaches, swells, and contracts as the stock in trade changes, increases, and diminishes, or may wholly expire by entire sale and disposition, at the will of the mortgagor. Such a mortgage is no certain security upon specific property.

"In such case the whole right to dispose of the property to pay a debt depends upon the will of the debtor, not affected by the rights of the mortgagee; and what reason is there in permitting the will of the debtor to determine whether property shall legally go to pay a debt or not? If it be the will of the debtor to appropriate the mortgaged property to pay the debt, it is binding as against the mortgagee; but if it be not the will of the debtor, and the property is seized upon execution, the rights of the mortgagee fasten upon the property and take it away from the execution creditor. Then the property is not held by the mortgage, but by the will of the debtor; because if the debtor sees proper to dispose of it, he has the power under the mortgage. He may dispose of the property, defeat the mortgage, and put the money in his own pocket; but if he refuses to pay a debt, and you seize the property in execution against his will, the mortgage steps in and restores it to the debtor. The whole matter, then, appears to rest upon the option of the debtor to appropriate the mortgaged property to the payment of his debts or not, and not upon the mortgage. No reasoning will change this result if a mortgagor retains possession and the full power of disposition over the mortgaged property.

"A mortgage upon a specific article, with possession and power of disposition left in the mortgagor, is in truth no mortgage at all; it is no certain lien. The power to hold possession and dispose of the property is inconsistent with the very nature of a mortgage. It indeed would not, perhaps, be going too far to say that such an instrument was a nullity.

"As to all the world, except as to the parties themselves, such a mortgage will be held void, as against the policy of the law."

On the other hand, it is contended that there are no conclusive presumptions of fraud, except such as are expressly so made by statute, or where the act is necessarily a fraud upon creditors; as where an insolvent debtor gives away his estate.

After mature consideration, we have reached the conclusion that the weight of authority and sounder reason is with those decisions which hold such mortgages, although recorded, to be void, except as between the parties thereto, irrespective of the good faith in fact of the transaction: that it should be so declared by the court if the intent and purpose of the parties to make such a mortgage are manifest from the terms of the instrument itself, or by the jury if not so manifest, but clearly shown by uncontradicted testimony.

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The principle is the same, the only difference being as to the character of the evidence and mode by which it is established.

It does not become necessary to decide whether such power to sell was, by necessary implication, given by the terms of the instrument now under consideration. The cause was submitted to the court without a jury, and the agreed statement of facts in the record shows that it was expected by the plaintiff below, himself, that Carpenter would sell in the usual course of trade, and with the proceeds replenish the stock; and that he knew that Carpenter was thus disposing of the mortgaged stock. Under this testimony, as applied to the law, we think the court erred in holding the mortgage valid as against the plaintiffs in error, and that had a jury so found under the evidence the verdict should have been set aside. For this error the judgment below should be reversed.

Another very important question presented by the record is that of the legal effect of a mortgage, as to third parties, upon after-acquired goods added to the mortgaged stock in trade.

In the opinion of the court, this and the remaining questions are not necessary to a proper decision of the case under the conclusion to which we have come, and as it is also a new question in this court, the determination of which might seriously affect important rights, we do not wish, without further argument and an exhaustive review of the authorities, and in a case in which it is necessarily involved, to decide it; hence no opinion is given upon this branch of the case.

Judgment reversed.

DAUENHAUER V. DEVINE.

(51 Tex. 480.)

Party-wall — right and manner of extension.

In the absence of any agreement regulating the height of a party-wall, either party may raise it, if it is of sufficient strength and can be raised without interference with or injury to the rights of the other party, but where the original agreement was for a dead wall, there can be no windows or other openings in the part so raised.

SUIT for injunction. The opinion states the facts. The plaintiff had judgment below.

J. H. McCleary, for appellant.

Woelder & Upson, for appellee.

GOULD, A. J. Devine and Dauenhauer, being proprietors of adjoining lots fronting on the Main plaza of the city of San Antonio entered into an agreement that Devine was "to put up party-walls (whenever he is prepared to build on his lots on Main plaza) with" Dauenhauer, who agreed to give Devine "one foot of ground, for the purpose of erecting said party-walls, off of his property on the Main plaza," and "to pay one-half of the cost of said party-walls." In case Dauenhauer "should wish to have plates placed in said party-walls for the convenience of laying joists," he agreed to pay Devine the cost of said plates.

Under this agreement Devine erected a two-story building known as the "dollar store," on his lot, the cost of the party-wall—two feet thick at the bottom and eighteen inches at the top, located so as to occupy one foot on each lot—being paid one-half by each. In this party-wall was one window, placed there by Dauenhauer with Devine's consent. At this time Dauenhauer had a one-story building on his lot. Subsequently, Dauenhauer, being engaged in erecting a three-story building on his lot and being about to raise the party-wall to three stories, was approached by Devine, and at his request signed the following instrument: "In consideration of G. P. Devine allowing me to put the dead third-story south wall of the building I am erecting on the corner of Main plaza and Commerce street on the south wall of the 'dollar store,' I obligate myself to allow said Devine to build (should he hereafter wish to do so, in putting another story on his buildings on Main plaza) on that part of the west line of the store occupied by D. and A. Oppenheimer fronting on Commerce street, as also on the end of said store: and I obligate myself to close up the window in the north wall of said 'dollar store' with solid masonry at the time of putting up my third-story wall." This instrument is dated June 7, 1877, witnessed by A. Siebel, and signed by S. Dauenhauer.

This suit was instituted by Devine July 14, 1877, alleging that Dauenhauer, in violation of these agreements and of the rights of petitioner as owner of one-half of the land on which the wall rested, was about to place windows in said third-story wall, instead of making it a dead wall, and alleging that these windows would be of irreparable damage to petitioner, exposing his adjoining building to fire; giving access to the roof thereof to unauthorized persons; de-

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preciating the value of his property by reason of the dangers to which it would thus be exposed; also preventing him from erecting a third story and using the party-wall as intended, praying for injunction and general relief.

The fiat of the judge was not such as to stop the construction of the wall with windows, but enjoined any use of the windows.

The defendant excepted to the jurisdiction of the court on the ground that no amount of damage was alleged, or other facts sufficient to give the court jurisdiction.

The answer of defendant alleged that the instrument of June 7, 1877, was signed by him in ignorance that the term "dead wall" meant a wall without windows, alleging his imperfect knowledge of the English language and other circumstances, and that he was overreached by plaintiff. The answer also charges that said instrument was void for want of consideration; denies any damage or increased danger of fire to plaintiff by reason of the windows; alleges that by reason of iron bars inserted in the windows the wall was substantially a dead wall in accordance with the spirit of the agreement, and that the windows were of great convenience to him and no damage to plaintiff.

There was conflicting evidence as to the circumstances under which Dauenhauer signed the paper of June 7. Several witnesses testified that the danger of fire from the windows would be greater to the three-story building of Dauenhauer than to the two-story building of Devine, though there would be some danger to the lower building from falling cinders. The architect testified that the party-wall was of sufficient strength to support the third story. The window in the second story referred to in the agreement was closed up. The only consideration for the agreement of June 7 was stated by Devine to be his assent to Dauenhauer building a three-story wall instead of a two-story wall, as, he says, was first contemplated. An architect testified that the term "dead wall" means a wall without openings, as technically used by architects and masons, but is not generally used in common language, and not generally understood by other than architects and masons. Another witness thought the expression a common one, meaning a wall without doors or windows.

The cause being submitted to the court, it was decreed "that the instrument signed by the said S. Dauenhauer, dated June 7, 1873, is a valid subsisting agreement between the said plaintiff and

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the said defendant," proceeding to set out the agreement in full. It was further decided that the injunction be perpetuated; "that the wall shall be and remain a dead wall, without windows or openings of any kind; that the said Dauenhauer shall wall up with masonry the windows placed in the third story of his said south wall during the pendency of this suit," and in default of his doing so within thirty days, directing the sheriff to cause said windows to be walled up, and collect the cost of Dauenhauer as under execution.

In regard to the question of the jurisdiction of the District Court, our opinion is that the nature of the suit, the injury complained of, and the relief sought were such as to give the District Court jurisdiction independent of the amount of injury alleged. The title and possession of land were so far involved as to make the case one for the District Court.

The objections to rulings of the court on the preliminary injunction and the admission of testimony are believed to present no questions requiring special notice. The issue of fraud in procuring the instrument of June 7 was one of fact, on which the evidence was conflicting, and on that point the finding of the court is conclusive.

The remaining questions may be stated as follows:

1. Was the instrument of June 7 a valid contract, or was it invalid because without consideration?
2. Did Dauenhauer have the right to insert windows in the third story of the party-wall?
3. If not, was the insertion of the windows a sufficient ground for injunction?
4. Is the decree of the court in any respect erroneous?

As we have no statute on the subject of party-walls, the rights of parties interested in such structures are to be regulated by the general principles of law and by the agreement, either express or implied, entered into.

The original agreement between Devine and Dauenhauer was for a party-wall, that is, a dividing wall between their houses," resting equally on the land of each, and "to be used equally by each for all the purposes of an exterior wall." *Fettrotch v. Leamy*, 9 Bosw. 530. After the erection of the wall each party continued to own in severalty his own lot and building thereon up to the division line; but each had an easement in the other half of the wall which

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entitled each to the use of the whole wall as a party-wall. *Freeman* on Co-tenancy and Partition, § 255; *Matts v. Hawkins*, 5 Taunt.; 1 Eng. Com. Law, 20; *Partridge v. Gilbert*, 15 N. Y. 601.

By the terms of their agreement the height of the wall was not specified, and in the absence of any such agreement or understanding the authorities recognize the right of either party to raise the wall, if it be of sufficient strength and can be raised without interfering with or injuriously affecting the rights of the other party. *Matts v. Hawkins*, 5 Taunt. 20; *Cubill v. Porter*, 8 B. & C. 257; *Brooks v. Curtis*, 50 N. Y. 644; s. c., 10 Am. Rep. 545; Wash. on Eas. 453, citing Code Napoleon, art. 659; Wood on Nuisances, § 234; *Eno v. Del Vecchio*, 4 Duer, 53; *Webster v. Stevens*, 5 id. 553.

Although at the time of their agreement the parties may have each contemplated erecting a two-story building, it would be unreasonable to imply that either intended to preclude himself from such an improvement as the addition of another story, or from the free use of his own property for that purpose. The more reasonable implication is, that the party-wall was intended to be raised with the buildings of either party, thus adding to rather than limiting the facilities for improvement by each.

The original agreement being silent on the subject, and the wall being of sufficient strength to admit of it without injury, Dauenhauer had the right to raise it to correspond to his three-story building without any further permission from Devine. It follows that the agreement of June 7 was without consideration, and was not binding on Dauenhauer as a contract.

But whilst Dauenhauer, in common with Devine, had the right thus to raise the dividing wall used by them in common, his right was to raise only such a wall as they had agreed on, and that was a wall without windows. The question is, what were his legal rights, not what was most convenient or profitable to him. His right to raise that part of the wall not on his own land could only grow out of the consent of the owner, and that consent was to a party-wall, a dividing wall between their houses, and obviously did not contemplate windows or doors. Ordinarily, division walls between houses of different proprietors would be walls without openings. In cities, one important consideration in building is danger of fire, and the construction of substantial dividing walls without openings is one of the safeguards against fire. In England and in some of the cities of the United States, the regulations in

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regard to division walls are largely controlled with reference to fire. See *Vollmer's Appeal*, 61 Penn. St. 118, for a valuable history of the legislation in England and in Pennsylvania on that subject.

Under the legislation in Pennsylvania, a party-wall in Philadelphia must be a solid wall of brick or stone without openings, and the erection of a wall with windows is held a case for the restraining power of equity. *Vollmer's Appeal*, 61 Penn. St. 118; *Sullivan v. Graffort*, 35 Iowa, 532. The Code Napoleon contains similar provisions. Wash. on Ease., 555, citing Code Nap., arts. 660, 662.

The extent of the injury to Devine in this case may not have been great, but we have seen that such an injury has been elsewhere regarded as calling for equitable interposition; and our opinion is, that the nature of the injury and the relation of the parties to the party-wall made injunction the proper remedy.

The decree of the court, however, must be reformed in so far as it declares the validity of the agreement of June 7. Not only was that agreement without consideration, but there was no prayer authorizing such a decree. The decree will be reformed in this respect, but in all other matters will be affirmed, the costs of appeal to be taxed against appellee.

Decree affirmed.

CUNNINGHAM V. INTERNATIONAL RAILROAD CO.

(51 Tex. 508.)

Negligence — railroad company — contractor for construction.

A railway company is not liable for damages resulting from negligence in the management of one of its trains, while being used and governed by contractors in the construction of a portion of its road under a contract with the company.*

SUIT for damages for personal injury alleged to have been sustained by a passenger on defendant's railway. The opinion sufficiently states the point. The defendant had judgment below.

Hamman, for appellant. I. Appellee, in the absence of special statute authority and exemption, could not divest itself of responsi-

*To same effect, *McCafferty v. Spuyten Duyvil, etc., R. Co.* (61 N. Y. 173, 19 Am. Rep. 287; *Hass v. Phil. & So. M. St. Co.*, ante, p. 402.

bility for the torts of persons operating its road, by transferring its corporate powers to other persons or by leasing its road to them. *York and Maryland Line Railroad Co. v. Winans*, 17 How. 30; *Nelson v. Railroad Co.*, 26 Vt. 717; *Chicago and Rock Island Railroad Co. v. Whipple*, 22 Ill. 108; 1 Redf. on Railw. 590, 593, 705, 708.

II. Appellee and Douglas, Brown, Reynolds & Co., in the use of the track or portion of the road which was completed though not turned over, as well as the portion they had constructed and had turned over, and in running their train which was used in transporting material for construction purposes and supplies, did not sustain the relation of contractors and contractee. Appellee retained control of the construction train, and did control it. *Houston and Texas Central Railroad Co. v. Moore*, 49 Tex. 31; *Carman v. S. & I. R. R. Co.*, 4 Ohio St. 414; Am. Lead. Cas. 649; 1 Pars. on Cont. 101-103.

III. When parties exercise by contract some chartered right or power of the company which they could not exercise independently of such charter, the company that has the charter must be held liable for all the injury which a third party sustains, whether between the company and the party exercising the chartered privileges, the relation of master and servant, or contractor and contractee, as technically understood and defined, exists. *O. and M. R. R. Co. v. Dunbar*, 20 Ill. 623; *Railroad Co. v. McCarthy*, 20 id. 385; *Illinois Central Railroad Co. v. Finnigan*, 21 id. 646; *T. P. & W. R. R. Co. v. Runbold*, 40 id. 143; *Clark v. Corporation of Washington City*, 12 Wheat. 54, 55, 59; *Vermont Central Railroad Co. v. Bazton*, 22 Vt. 365; 14 Ill. 85; 15 id. 72.

Davis & Beall, for appellee.

BONNER, A. J. The principal question underlying this case, and which arises upon the judgment overruling the demurrer of the plaintiff to the answer of defendant and upon the charge of the court to the jury, may be briefly stated as follows:

Is the defendant-company liable in damages for the act of Douglas, Brown, Reynolds & Co., independent construction contractors, for an alleged negligent management of one of defendant's trains, used and controlled by Douglas, Brown, Reynolds & Co., for construction purposes, upon that part of the road not completed and delivered to defendant?

There is a marked distinction between the liability of the master for the acts of an ordinary servant in the usual scope of his duties as such, and that of an employer for the acts of an independent contractor.

This distinction rests upon the reasonable principle, that in a proper case, the liability of the master should be commensurate with the extent only of his right to control. *Blackwell v. Wiswall*, 24 Barb. 355; *Steel v. Railroad Co.*, 81 Eng. Com. Law, 550; *Callahan v. Railroad Co.*, 23 Iowa, 562; 1 Minor's Inst. Com. and Stat. Law, 236, and the following authorities therein cited; 1 Pars. on Cont. 89 *et seq.*; *Quarman v. Burnett*, 6 M. & W. 492; *Rapson v. Cubitt*, 9 id. 710; *Milligan v. Wedge*, 12 Ad. & El. (40 Eng. Com. Law) 737; *Reedie v. Railway Co.*, 4 Exch. 244; *Knight v. Fox*, 5 id. 721; *Overton v. Freeman*, 11 C. B. (73 Eng. Com. Law) 867; *Chicago v. Robbins*, 2 Black, 418, 428; *Robbins v. Chicago*, 4 Wall. 657, 679; *Water Co. v. Ware*, 16 id. 566; *Ellis v. Sheffield Gas Co.*, 2 El. & Bl. (75 Eng. Com. Law) 767; *Newton v. Ellis*, 5 id. (85 id.) 124; *Hole v. Railway Co.*, 6 H. & N. 497; *Railroad Co. v. Sanger*, 15 Gratt. 241, 242.

In the first relation, that of master and servant, the master has the right to direct the conduct of the servant and the mode and manner of doing the work, and hence his corresponding liability for an improper execution of the same. Wood on Mast. and Serv., § 281.

"He is deemed the master who has the supreme choice, control, and direction of the servant, and whose will the servant represents not merely in the ultimate result of the work, but in all its details." Shearm. & Redf. on Neg., § 73.

In the second relation, that of employer and independent contractor, there is no such control and direction by the employer over the servant in the details of the work.

"The true test * * * by which to determine whether one who renders service to another does so as a contractor or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished." Shearm. & Redf. on Neg., §§ 76-79; 1 Redf. on Railways, 505; *Pack v. Mayor of New York*, 4 Seld. 222.

It is now the well-established doctrine in Europe and the generally prevailing rule in this country, that the ordinary relation of

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principal and agent and master and servant does not subsist in the case of an independent employee or contractor who is not under the immediate direction of the employer.

The leading case of *Bush v. Steinman*, 1 B. & P. 404, upon which are based the cases in England and in those States of the Union which hold the doctrine that the employer is liable for the acts of an independent contractor, has been shown by subsequent decisions not to be founded upon principle, and has been overruled by the great weight of authority. Shearm. & Redf. on Neg., §§ 79, 82, and authorities cited; *Hilliard v. Richardson*, 3 Gray, 349, where, in an elaborate opinion, the leading authorities on this subject are collected and reviewed. *Chicago v. Robbins*, 2 Black, 418, 428.

The subsequent, and in our opinion, better-considered decisions than that of *Bush v. Steinman*, now follow the leading cases of *Reedie v. London and Northwestern Railway Co.*, 4 Exch. 244, to the effect that such employer is not thus liable for the acts of an independent contractor. 1 Redf. on Railways, ch. 20; Pierce on Am. Rail. Law, 235, and authorities cited; *Hilliard v. Richardson*, 3 Gray, 349; *Railroad Co. v. Van Bayless*, Tex. Ct. of App., in manuscript.

In the case of *Railroad Co. v. Meador*, 50 Tex. 87, this court, in commenting upon the above case of *Railroad Co. v. Van Bayless*, and which in principle was the same as the one now before the court, says :

“ The charge asked embraced a general principle which has been recognized by the Court of Appeals in a well-considered opinion reviewing the authorities. The correctness of the opinion reached in that case is not doubted. Whilst the road was being constructed by independent contractors, a construction train ran over and killed a mule belonging to Van Bayless, and it was held, that the railroad company was not liable. There was no duty to Van Bayless devolving upon and neglected by the railroad ; nor was any trespass on him or his rights incident to the proper performance of the contract.”

That Douglas, Brown, Reynolds & Co. may have used, as a means to assist in carrying out their contract to construct the road, a train belonging to the defendant-company, and operated by servants primarily employed by it, would not, of itself, make the company liable for their acts, unless it had the immediate control and management of the train.

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To hold otherwise would virtually forbid parties to construct works of improvement, or perform many other acts, except by their own servants, unless at great peril for liability for actions of others over whom they have no immediate control. *Hale v. Dutant*, 39 Tex. 669, and the following authorities cited: *Blackwell v. Wiswall*, 24 Barb. 356, and 26 id. 618; *Felton v. Deall*, 22 Vt. 173; *Blake v. Ferris*, 1 Seld. 51; *Murch v. Railroad Co.*, 9 Fost. 32; *Fiske v. Framingham Man. Co.*, 14 Pick. 493; *Blattenberger v. Schuykill*, 2 Miles (Penn.), 313; *Peachey v. Rowland*, 76 Eng. Com. Law, 181.

In this case the evidence shows that the defendant used commendable diligence, more perhaps than the strict letter of the law might have required, to prevent the carriage of passengers on the construction trains, and it reasonably appears that this was known to the plaintiff. His act in riding upon the train against the express wishes of the company, and before the road had been received and transportation of passengers invited or allowed or the sale of tickets permitted, could not in law have constituted a contract upon the part of the company with him, and would, under the circumstances, have constituted such contributory negligence on the part of the plaintiff as should prevent his recovery against the defendant for a tort, unless willfully or wantonly committed, even had a right of action existed. *Robertson v. Railroad Co.*, 23 Barb. 91; *Railroad Co. v. Montgomery*, 7 Ind. 474; *Shearm. & Redf. on Neg.*, § 264.

The principle that a railroad company cannot delegate to an employee its chartered rights and privileges so as to exempt it from liability, does not extend to the use of the ordinary ways and means for the construction of the road, but to the use of such extraordinary powers only as the company itself could not exercise without having first complied with the conditions of the legislative grant of authority.

Thus, after having first procured the right of way, the company can delegate to another lawful authority to enter upon the same and make its road-bed and perform other proper acts of construction; but it cannot delegate such lawful authority without having first secured the right of way by donation, purchase, or the exercise of the right of eminent domain. *Meador v. Railroad Co.*, *supra*; *Pierce on Am. Rail. Law*, 239, 240, and note.

There being no error apparent of record, the judgment of the court below is affirmed.

Judgment affirmed.

CITY OF BRYAN V. PAGE.

(51 Tex. 532.)

Municipal corporation — contract — ultra vires.

A city charter provided for the exercise by ordinance of the power to employ legal counsel for the assistance of the common council, etc. No such ordinance was passed, but the mayor employed attorneys to give an opinion regarding municipal matters, which was read at a meeting of the common council and acted on. *Held*, that the attorneys could not recover of the city for their services in giving the opinion.

ACTION for legal services. The opinion states the case. The plaintiffs had judgment below.

John N. Henderson, for appellant.

Page & Sims, for themselves. Appellant, by its mayor, having retained appellees for work in the line of their profession, and secured that work, used and acted upon it in its corporate capacity and had the benefit of it, though a municipal corporation, with limited powers, is bound to appellees upon an implied assumpsit, in the absence of any city ordinance authorizing or making the retainer for the reasonable value of the services so rendered. *Lewis v. San Antonio*, 9 Tex. 70; *Sturtevant v. Alton*, 3 McLean, 393; *Fanning v. Gregoire*, 16 How. 524; *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453; (overruled 20 Cal. 33, 96, 134;) *Bissell v. Jeffersonville City*, 24 How. 300; *Supervisors v. Schenck*, 5 Wall. 772; *Hitchcock v. City of Galveston*, 6 Otto, 350, 351; *State Board of Agriculture v. Citizens' Street Railroad Co.*, 47 Ind. 407; s. c., 17 Am. Rep. 702; *Maher v. Chicago*, 38 Ill. 266; *Argenti v. San Francisco*, 16 Cal. 256; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *De Voss v. City of Richmond*, 18 Gratt. 338; *Zabriskie v. Cleveland and Cincinnati Railroad Co.*, 23 How. 400; *Cenley v. Columbus Tap Railroad Co.*, 44 Tex. 581-583; *Parish v. Wheeler*, 22 N. Y. 62.

Appellant, acting in the line of her duties as a deputed arm of government, is limited and restricted to the exercise of her legislative offices by ordinance, as prescribed in her charter; but when appellant assumes the role of a private individual or private corporation, as in the case at bar, she is governed by the general law

as to liability for contracts and the mode of fixing such liability. *De Voss v. City of Richmond*, 18 Gratt. 338; Field on Corp., §§ 259-263, 266, 273; *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280; *Brady v. Mayor, etc.*, 1 Barb. 584; Dill. on Mun. Corp., § 371; Ang. & Ames on Corp., §§ 110, 271; *Chaffee v. Granger*, 6 Mich. 51; *Douglass v. Virginia City*, 5 Nev. 147; *Seibrecht v. New Orleans*, 12 La. Ann. 496; *Rome v. Cabot*, 28 Ga. 50; *Miller v. Milwaukee*, 14 Wis. 642; *Bulkley v. Derby Fishing Co.*, 2 Conn. 254; *Le Couteulx v. City of Buffalo*, 33 N. Y. 333; *Burrill v. Boston*, 2 Clif. 590, 596; *Seagraves v. Alton*, 13 Ill. 371. And especially as to contracts with attorneys, see *Langdon v. Castleton*, 30 Vt. 285; *Smith v. Sacramento*, 13 Cal. 531; *Hornblower v. Duden*, 35 id. 664; *Lewis v. Mayor of Rochester*, 9 C. B. (N. S.) 401; *Attorney-General v. Norwich*, 2 Myl. & Cr. 406; Brown on Com. Law, 567.

GOULD, A. J. This suit was instituted to recover of the city of Bryan the reasonable value of professional services rendered by the law firm of Page & Sims, in preparing a legal opinion as to the validity of a certain election for municipal officers in said city.

The charter of the city (section 4) provides that "the common council, by ordinances, shall have power as follows": * * * "Thirty-fifth. In relation to the employment of legal counsel for the assistance of the common council, and to prosecute in behalf of the corporation in criminal cases, and to institute and defend civil suits in their behalf." The claim of plaintiffs does not rest upon any ordinance of the common council, but upon the action of the mayor in employing them to prepare the opinion, and the subsequent action of the council in availing themselves of the opinion. The evidence not only negatives the passage of any ordinance authorizing or ratifying the employment, but it also negatives any action of the council whatever to that effect, unless such action be inferred from the fact that the opinion was read at a meeting of the council, in connection with an opinion from other attorneys, and that the council acted in accordance with these opinions, holding the election invalid.

We are of opinion that neither the mayor nor the common council were authorized to bind the city by contract for legal counsel for their assistance, no ordinance having been passed in relation to such employment.

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The charter gave the power to employ legal counsel, but prescribed that the power be exercised by, or at all events in accordance with, an ordinance of the common council. The charter — the source of all the power of the mayor or council over the subject — having limited the mode of its exercise, they could not in a different mode make a valid contract; nor could they by any subsequent approval or conduct impart validity to such contract. As without an ordinance they were without power to bind the city by an express contract to pay for legal services, the law would not imply any such contract against the city. "The law never implies an obligation to do that which it forbids the party to agree to do." *Brady v. Mayor of New York*, 16 How. Pr. 432, as cited in *Zottman v. San Francisco*, 20 Cal. 105.

If municipal corporations can be held liable on an implied contract where the charter has withheld the authority to make an express contract, it is easy to evade and render useless such restrictions in their charters. The claim of plaintiffs, that the city of Bryan was bound to pay them because of their employment by the mayor and because of the use made of their opinion by the common council, cannot be maintained. They were bound to know of the limitations on the authority of these officials, and their services were rendered at their own hazard. *Zottman v. San Francisco*, 20 Cal. 105; *Bladen v. Philadelphia*, 60 Penn. St., 464; *City of Leavenworth v. Rankin*, 2 Kan. 357; 1 Dill. on Mun. Corp. 373.

The case was submitted to the court without a jury, and the court gave judgment for plaintiffs. In accordance with the view which we have taken of the construction of the charter and of the law of the case, the judgment is reversed, and judgment is here rendered in favor of the city of Bryan that the plaintiffs take nothing by their suit, and that the defendant recover of the plaintiffs all costs in the court below and in this court.

Reversed and reformed.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

BURCH V. HARDWICK.

(30 Gratt. 34.)

Municipal corporation — police officers not servants of.

The chief of police of a city is an officer of the State, and is not subject to removal by the mayor, and the mayor is liable in damages to him in a civil action for such removal.*

ACTION of damages by Hardwick, chief of police of the city of Lynchburg, against Burch, the mayor, for removing him from office. A demurrer to the declaration was overruled, and the plaintiff had judgment. The opinion sufficiently states the facts.

J. Alfred Jones and Don P. Halsey, for appellant.

Thomas J. Kirkpatrick and E. P. Goggin, for appellee.

STAPLES, J. [Omitting minor considerations.]

But there is another and more satisfactory reason which applies equally to the demurrer, to the instruction, and to the motion for a new trial; and that is, that the defendant, as mayor, had no

*See, to same effect, *Follock's Adm'r v. Louisville*, (13 Bush, 221), 26 Am. Rep. 290, *Kear v. City of Corpus Christi*, p. 613, ante.

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power under the Constitution and laws to remove the plaintiff from his office of chief of police. This question has been very ably argued by counsel, and has received the careful consideration of the court. The provision of the Constitution under which this power is claimed as belonging to the mayor is found in section 20, article 6, of that instrument. Code of 1873, p. 88. It provides that the mayor shall see that the duties of the various city officers are faithfully performed. He shall have power to investigate their acts, have access to all books and documents in their offices, and may examine them and their subordinates on oath. He shall have power to suspend or remove such officers, whether they be elected or appointed, for misconduct in office or neglect of duty, to be specified in the order of suspension or removal.

On the other hand, the amended charter of the city of Lynchburg (found in Acts of 1871-72, p. 118), provides for a police department, to be under the control and management of police commissioners, consisting of the mayor, the president of the city council, and the judge of the corporation court.

It is made their duty to appoint the chief of police, through whom they may promulgate all rules and regulations and orders to the whole police force of the city. The said chief of police holds his office during the term of two years, or until said board, for malfeasance or misfeasance, shall remove him; but in case of misconduct on his part, he may be removed by the votes of two-thirds of the city council. The mayor, at any time upon charges being preferred, or upon finding said chief of police to have been guilty of misconduct, shall have power to suspend him from office until the board of commissioners shall convene and take action in the matter; such suspension, however, not to last longer than ten days without affording the party an opportunity of being heard in his defense; and upon hearing the proofs a majority of the commissioners may discharge or restore him. See § 36, paragraphs 1, 2, 3 and 4, pp. 128-9.

It will be perceived there is an apparent conflict between these provisions of the Lynchburg charter and the clause of the Constitution already cited. For if the chief of police be a city officer within the meaning of the Constitution, he is subject to removal by the mayor only, and the provision of the charter taking the power from him and vesting it in the police board is null and void.

This court has been repeatedly called on to pronounce legislative

enactments void upon the ground of their repugnancy to the Constitution, and it has always declined to do so unless this repugnancy is, in its judgment, beyond all reasonable doubt. It has always proceeded upon the idea that the opposition between the Constitution and the law is such that the judge feels a clear and strong conviction of their incompatibility with each other. Whenever a statute can be so construed and applied as to avoid conflict with the Constitution such construction will be adopted. In the language of Mr. Justice WASHINGTON : "It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt." *Ogden v. Saunders*, 12 Wheat. 213, 270; Cooley's Const. Lim. 182, 183.

In the present case this rule of construction deserves special consideration, because the same provisions in regard to the appointment, control and removal of the chief of police are found in the charters of the cities of Richmond and Norfolk, and perhaps other cities, and the effect of an adverse decision by this court will be to annul important and salutary laws carefully framed for the government and security of the chief cities and towns of the Commonwealth. Are we to declare these charters null and void? Are we to overthrow institutions deemed by the legislature and the people of the cities of the greatest value? I think not, unless upon very convincing reasons.

It must be borne in mind that cities and towns are mere territorial divisions of the State, endowed with corporate powers to aid in the administration of public affairs. They are instrumentalities of the government acting under delegated powers, subject to the control of the legislature, except so far as may be otherwise expressly provided by the Constitution.

Although the mayor is invested with the power of removing city officers, it will not be denied, I imagine, that the legislature may establish an office and appoint the incumbent, who, although exercising his jurisdiction exclusively in the city limits, is not yet a city officer within the true intent and meaning of the Constitution. This distinction is recognized in the clause of the Constitution already cited relating to the powers of the mayor. It is there declared that all *city, town and village* officers, whose election or appointment is not provided for by this Constitution, shall be

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elected by the electors of said cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the general assembly shall designate. "*All other* officers, whose election or appointment is not provided for by this Constitution, and all other officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed as the general assembly may direct." Thus recognizing a distinction between those who are technically "*city officers*" and others whose jurisdiction and functions may be limited to cities, and yet are not considered "*city officers*." In the former case the appointment is always made by the electors of the city, or some authority of the city. In the latter case it is made in such mode as the general assembly may direct. Indeed it would be a most remarkable condition of things that the legislature, by the mere act of creating a municipal corporation, thereby divests itself of all jurisdiction and control of every officer elected or appointed for such corporation.

Who, then, are the "*city officers*" in the true and literal sense of the term? It is not easy to define them in all cases; but there are many such provided for in the charter of the city of Lynchburg, and in the charters of other cities. Among these are, perhaps, city engineers and surveyors, officers having superintendence and control of streets, parks, water-works, gas-works, hospitals, sewers, cemeteries, city inspectors, and no doubt many others well known in large cities. Their duties and functions relate exclusively to the local affairs of the city, and the city alone is interested in their conduct and administration.

On the other hand, there are many officers, such as city judge, sergeant, clerk, Commonwealth's attorney, treasurer, sheriff, high constable, and the like, some of whom are recognized by the Constitution, while others are not. All these are generally mentioned as *city officers*, and they are even so designated in the Constitution; but no one has ever contended that either of them is in any manner subject to the control and removal of the mayor. The reason is, that while they are elected or appointed for the city, and while their jurisdiction is confined to the local limits, their duties and functions, in a measure, concern the whole State. They are State agencies or instrumentalities operating to some extent through the medium of city charters in the preservation of the public peace and good government. However elected or appointed, however paid, they are as much State officers as constables, justices

of the peace and Commonwealth's attorneys, whose jurisdiction is confined to particular counties.

That the chief of police is within the influence of the same principle is apparent from the most cursory reflection. Under the charter of the city of Lynchburg — and the same is true elsewhere — he has generally the power to do whatever may be necessary to preserve the good order and peace of the city. It is his duty at all times to see that the police force preserves the public peace, to prevent the commission of crime, and arrest offenders, and protect the rights of persons and property. (Sec. 36, §§ 1, 2, 3, 4, page, 128, acts of 1871 and 2; Police Regulations, § 14.) Among the thousands of citizens and strangers that enter a great city in the course of a year, in pursuit of business or pleasure, there is not one that is not interested to a greater or less degree in this officer, not only as a conservator of the peace generally, but in the special protection he affords against violence and wrong. When the mob rages in the streets, when the incendiary and the assassin are at work, they do not offend against the city, but against the State. When they are detected and arrested it is by the chief of police and his subordinates, under the authority of the State laws and as an officer of the State; and when they are tried and convicted, it is by officers representing the State and her sovereign power.

This distinction has been recognized and enforced in a number of well-considered cases, and by able commentators. It is important, says Judge DILLON, to bear in mind the distinction between State officers — that is, officers whose duties concern the State at large or the general public, although exercised within defined territorial limits, and municipal officers whose functions relate exclusively to the particular municipality. The administration of justice, the preservation of the public peace, and the like, although confined to local agencies, are essentially matters of public concern, while the enforcement of municipal by-laws, establishment of gas-works, of water works, the constructions of sewers, and the like, are matters which pertain to the municipality, as distinguished from the State at large. And it has been several times determined that the legislature may, unless specially restrained in the Constitution, take from a municipal corporation its charter powers respecting the police and their appointment, and by statute itself directly provide for permanent police for the corporation, under the control of a board of police not appointed or elected by the corporate authority,

but consisting of commissioners, appointed by the legislature. *Baltimore City v. Board of Police*, 15 Md. 376 ; *People v. Mahaney*, 13 Mich. 481 ; *People v. Draper*, 15 N. Y. 532, where the act to establish the Metropolitan police district was held constitutional ; *Police Commissioner v. City of Louisville*, 3 Bush, 597 ; *Diamond v. Cain*, 21 La. Ann. 309 ; *State of Louisiana v. Levi*, id. 538. The cases concur in holding that the police officers are in fact State officers, and not municipal, although a particular city or town be taxed to pay them. 1 Dill. on Mun. Corp., §§ 33, 34 ; § 773 and note 1, where the foregoing views are expressed.

In *Buttrick v. City of Lowell*, 1 Allen, 172, it was held that a city is not liable for an assault committed by its police officers, even though it was done in an attempt to enforce an ordinance of the city. BIGELOW, C. J. delivering the opinion of the whole court, said : "Police officers can in no sense be regarded as agents or officers of the city. Their duties are of a public nature, their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts.

The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are intrusted, are derived from the law, and not from the city or town under which they hold their appointment."

In the case of the *People v. Hurlbut*, 24 Mich. 44 ; s. c., 9 Am. Rep. 103, the question was as to the constitutionality of a statute creating a board of public works for the city of Detroit, appointed by the legislature, and having charge of the city buildings, with authority to make contracts on behalf of the city, and to do many other things of a legislative character which generally belong to the common councils of cities alone. The whole subject was discussed by Chief Justice CAMPBELL and Judge COOLEY, in opinions evincing profound research and ability. Chief Justice CAMPBELL, drew a distinction between the police act under which a board of police commissioners was appointed for the cities, and the act then under consideration, which was known as the public works acts. He said : "The general purposes of the police act were such as appertain directly to the suppression of crime and the administration of justice. There is therefore no constitutional reason for holding it to be other than a regulation of matters pertaining to

the general policy of the State and subject to State management. The police board is clearly an agency of the State government, and not of the municipality, whereas the purposes of the public works act were directly and evidently local and municipal." 81-83.

Judge COOLEY said in the course of his opinion: "For those classes of officers whose duties are general, such as the judges, the officers of militia, the *superintendent of police*, of quarantine, and of ports, by whatever name called, provision has, to a greater or less extent, been made by State appointment. But these are more properly State than local officers; they perform duties for the State in localities, as collectors for the general government, and a local authority for their appointment does not make them local officers when the nature of their duties is essentially general. In the case before us the offices in question involve the custody, care, management and control of the pavements, sewers, water-works, and public buildings of the city, and the duties are purely local."

In *Cobb v. City of Portland*, 55 Me. 381, the same question was presented, and was decided in the same way. DICKERSON, J., delivering the unanimous opinion of the court, said: "But the plaintiff was not agent or servant of the city of Portland, nor was the policeman whom he arrested. Both were acting under the authority of the State, as the conservators of the public peace, the peace of the State, not the peace of the city of Portland alone. It is true they derived their authority immediately from the city of Portland, but that was done by the legislature as a matter of convenience."

While engaged in the service stated (preserving the peace), they represented the authority and dignity of the State, and not that of the city of Portland.

The cases of *Fisher v. Boston*, 104 Mass. 87; s. c., 6 Am. Rep. 196; *Cobb v. City of Portland*, 55 Me. 381; *People v. Draper*, 25 Barb. 341, 374; *Mayor of Baltimore v. State Board of Police*, 15 id. 376, are in entire accord with the decisions already cited. See, also, 2 Dill. on Mun. Corp., § 773, and notes, and numerous cases there cited. The distinction recognized in all of them is between officers whose duties are exclusively of a local nature and officers appointed for a particular locality, but yet whose duties are of a public or general nature. When they are of the latter character they are State officers, whether the legislature itself makes the appointment or delegates its authority to the municipality.

The State, as a political society, is interested in the suppression of crime and in the preservation of peace and good order, and in protecting the rights of persons and property. No duty is more general and all-pervading than this. It extends alike to towns and cities as to the country. It looks to the preservation of order and security in the State, at elections, and at all public places; the protection of citizens, strangers, travellers at railway stations, at steamboat landings; the enforcement of the laws against intemperance, gambling, lotteries, violations of the Sabbath, and in fine, the suppression of all those disorders which affect the peace and dignity of the State and the security of the citizen. The instrumentalities by which these objects are effected, however appointed, by whatever name called, are agencies of the State, and not of the municipalities for which they are appointed or elected. The whole machinery of civil and criminal justice, says a learned judge, has been so generally confided to local agencies, it is not strange if it has sometimes been considered as of local concern. But there is a clear distinction in principle between what concerns the State and that which does not concern more than one locality.

These are the principles established by the cases already cited. Against them not a decision, not even the *dictum* of a writer has been produced, except a single observation contained in the opinion of this court, in *Burch, Mayor, v. Hardwicke* (the same parties now before the court, reported in 23 Gratt. 51), where Judge BOULDIN seems to concede that the power of removing the chief of police is vested in the mayor. It is, however, but just to say that the question received but little consideration by this court in that case; nor was there any thing in the case itself requiring a decision of the point. The real contention was, whether the writ of prohibition would lie in the case. Judge BOULDIN laid down the rule as well established, that the writ of prohibition is a proceeding between *courts* bearing the relation of *supreme* and *inferior*, and that it does not lie from a court to an executive officer. The case was disposed of upon that ground alone, and all that was said outside of it was an *obiter dictum* of the court. That decision, therefore, does not preclude us from determining the present case according to our best convictions. If the view already taken be correct, it is plain that the defendant, in removing the plaintiff from his office of chief of police, exceeded his powers. This being so it is quite immaterial to inquire whether the instruction of the Cir-

cuit judge be strictly correct. Plainly the defendant could not be prejudiced by it; for if it be conceded that the plaintiff was not justified in disobeying the order given him, the defendant exceeded his powers in removing him on that ground. All that the defendant could do was to suspend the plaintiff until the matter could be investigated by the board of police commissioners.

It is no part of our duty to inquire into the motives of the legislature in creating a board of police for the city of Lynchburg, or any other city, and in clothing it with the absolute control of the chief of police. The legislature may have supposed that the mayor, being elected by the popular vote, might be under strong temptation to use the police force for the purpose of securing his own promotion and success. It is not to be denied that in a large and populous city such a body of men, dependent upon the will of one man, may become a political engine of mischief in times of high political and party excitement.

On the other hand, a board of police composed of the mayor, the president of the common council, and the judge of the hustings court, would be equally as efficient as the mayor in the control of the police department, especially when the latter is invested with the power of suspension for a disobedience of orders or other misconduct. Three of the largest cities of the State have been acting under the same system for several years, and no complaint has been made of the want of discipline, subordination and good government in either of them. In such case nothing would justify the interference of the courts except the clearest conviction that the Constitution had been violated.

Another question argued before this court is, whether the mayor of a city, in exercising the power of removal of a subordinate, can in any case be held liable for damages, however malicious or corrupt may have been his motives. Upon this question a great number of authorities have been cited on both sides. Some of these maintain the doctrine that no public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, or however malicious the motive which produced it; and this rule extends to judges, from the highest to the lowest, and all public officers, whatever name they may bear, in the exercise of judicial powers. On the other hand, there are numerous authorities which hold that this exemption from civil liability is confined exclusively to those judges of general jurisdiction whose proceedings are matters of

record, and has no application to inferior judges and others whose acts are not verified by record evidence.

Whatever may be the conflict of judicial opinion on this point, all the authorities are agreed that when the judge or other officer has no jurisdiction over the subject matter, and when the act of which complaint is made is maliciously or corruptly done, he is liable in damages to the party aggrieved by his conduct. This whole question is discussed in a very able opinion of Mr. Justice FIELD, in *Bradley v. Fisher*, 13 Wall. 335. I do not deem it necessary to refer to any other authority upon this point.

In the present case it is clear that the defendant exceeded his jurisdiction in removing the plaintiff; and it must be assumed that he was prompted by malice in doing so, for the plaintiff offered to prove the fact, but was prevented by the objection of the defendant; and the defendant cannot now be heard to deny the existence of malice on his part. There is no doubt but that the defendant believed that the power of removal was vested in him by the Constitution, and for an innocent mistake in assuming that power, under all the circumstances, no jury or court would be inclined to hold him responsible in damages. It is only when the power is used for the gratification of personal hostility and dislike, that the question assumes an entirely different aspect, and in that aspect alone it is now presented to this court.

It has been suggested, however, that the action is based upon an actual removal of the plaintiff from his office by the defendant; and according to the present view, the proceeding of the defendant was a mere nullity, and the plaintiff was still the incumbent of the office. It is sufficient to say that the plaintiff, as a matter of fact, was removed from his office and denied the privilege of exercising its functions by the defendant; and however illegally it may have been done, it was a power exercised under color of the office of mayor, and it does not lie in the mouth of the defendant to evade liability for his acts upon the ground that he exceeded his powers and jurisdiction.

The plaintiff attempted to restrain the defendant from removing him from his office by judicial process; but was denied relief upon the ground that the courts had no power to award a writ of prohibition against an officer exercising merely executive functions. After this the plaintiff, instead of continuing an angry and unseemly contest with the defendant, perhaps to the injury of the city of

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Lynchburg, might well acquiesce in his ejection from the office, and resort to the courts for redress of any wrong he had sustained. The defendant has certainly no cause to complain that this course has been pursued.

[Omitting minor matters.]

MONCURE, P., and ANDERSON and BURKS, JJ., concurred in the opinion of STAPLES, J.

CHRISTIAN, J., dissented.

Judgment affirmed.

CHEATHAM V. HATCHER.

(30 Gratt. 56.)

Will — attestation — request — proof — draftsman as beneficiary.

A will need not be proven by two subscribing witnesses, but may be admitted to probate upon extrinsic evidence, even where one of them denies the due execution.

A request to a witness to subscribe a will may be made by a third person, provided the testator hears and understands it, and does not dissent.

A will may be valid, although the draftsman is a beneficiary under it, but it will be carefully scrutinized.

ACTION to determine the validity of a will. The opinion states the facts. The court below refused probate.

F. W. Christian, C. C. McRae, for appellants.

John Hunter, for appellees.

STAPLES, J. This is a controversy concerning the probate of a paper purporting to be the last will of Mrs. Ann P. Hatcher. The parties in the court below waived a trial by jury and submitted the whole matter to the determination of the judge, who, after hearing all the evidence, was of opinion that "the paper writing in question is not the last will of Ann P. Hatcher," and refused to admit the same to probate. From that order an appeal was taken to this court. The only question in the case we have to determine is whether the will was subscribed by the witnesses in the presence of

the testatrix in the manner required by the statute. Upon this question there is some conflict in the testimony, and if the learned judge of the Circuit Court had based his decision upon the credit given by him to the witness against the will rather than to those in its favor, this court, upon familiar principles, would not undertake to reverse that decision, unless, indeed, in case of a plain and palpable mistake or error. It is obvious, however, that the learned judge proceeded upon no such ground. His written opinion, which is part of the record, shows that according to his view, it is necessary to a valid will that every fact relating to the execution of the instrument and the sanity of the testatrix shall be proved by the two subscribing witnesses.

After citing the statute and a decision of Chancellor WALWORTH, in *Scribner v. Crane*, 2 Pa. 147, he proceeds as follows: "Judge BROOKE, in the case of *Dudleys v. Dudleys*, 3 Leigh, 436, reiterated in *Clarke v. Dunnavant*, 10 Id. 13, 29, says 'that however full the testimony of one witness may be to prove a will, our statute requires two witnesses to the facts which are necessary to be proved.' Let us, then, apply these principles to the case before us." The learned judge then comments upon the evidence of the two subscribing witnesses — first of Dr. Grymes, and then of Clarke. He declares that they are at points; that Clarke says that he never at any time heard Mrs. Hatcher acknowledge the will; that he did not see her sign or make her mark as a signature; she did not speak while he (Clarke) was in the room, nor is it pretended that she ever spoke afterward, and to use his own language, she was in a "dying condition," and her eyes set in death. The learned judge then asks: "Is it necessary, then, that two witnesses should certify to their knowledge of the mental capacity of the testatrix at the time the paper is completed; that it was executed by her freely and understandingly, with a full knowledge of its contents? Surely Clarke could not so testify."

After these explicit avowals, I cannot see how it is possible to avoid the conclusion that the learned judge was of opinion that the two subscribing witnesses must prove the proper execution of the will and the capacity of the testatrix; and his rejection of the will was based upon the absence of such proof in this case. This view is strongly confirmed by the fact, that although there is other testimony in the record besides that of the two subscribing witnesses, bearing directly upon the question of the due execution of

the will and the capacity of the testatrix, no allusion is made to that testimony. It is impossible for this court to say what would have been the decision of the Circuit judge had he felt himself at liberty to consider the evidence of the other witnesses, or had he been of opinion that a will may be proved by one of the subscribing witnesses only. It is fair to presume that if he had believed that Mrs. Hatcher was unconscious at the time of Clarke's attestation, or had he believed upon the whole evidence that the will was not duly executed, he would have so declared, instead of confining his view to the testimony of the two subscribing witnesses as affected by the particular rule of law announced by him. At all events, a careful reading of the opinion would satisfy every one that the judge of the Circuit Court refused the probate, not because he believed the statement of Clarke in preference to the other evidence, but because he held to the idea that the will must be proved, as also the capacity of the testatrix, by the two subscribing witnesses.

I have thus dwelt upon this point because it is necessary to understand precisely the ground upon which the will was rejected in the court below. For all will agree that if that decision was based, not upon the weight and credibility of all the evidence, but upon an erroneous principle announced, with respect to the number of witnesses required to establish a particular fact, the parties have a right to insist that the case shall be reviewed in this court. The farthest this court has gone is to declare that the decision of the trying court for or against the will, is to conclude all mere questions of fact depending upon the credit to be given to the witnesses. *Jesse v. Parker's Adm'rs*, 6 Gratt. 57. The question then arises, is the construction of the statute correctly given by the learned judge of the Circuit Court? The opinion of Judge BROOKE, in *Clarke v. Dunnavant*, from which the extract is given, was not concurred in by the two other judges who sat in that case. Judge PARKER said: "The law regulating devises requires reasonable proof that every statutory provision has been complied with, but it does not prescribe the mode of proof, nor that the will shall be proved, as well as attested, by two or more credible witnesses, nor that frail memory shall change its nature and perform impossibilities." And this was the view taken by Judge TUCKER.

In *Pollock v. Glasells*, 2 Gratt. 439, 462, Judge BALDWIN said: "The statute does not prescribe the number of witnesses by whom

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a will shall be proved, but the number only by whom it shall be attested. Any one of the subscribing witnesses may prove the execution of the will and its due attestation by himself and the others, and if his testimony be satisfactory, it is sufficient. If this were otherwise, then the proof of a duly attested will might be defeated by the death or forgetfulness of some of the other witnesses." In this part of the opinion I understand all the judges as concurring, including Judge BROOKE.

In *Jesse v. Parker's Adm'rs*, 6 Gratt. 57, Judge ALLEN, delivering the opinion of the whole court, said that, "Although there must be satisfactory proof that every statutory provision has been complied with, in order to establish a will, the law does not prescribe the mode of proof, nor that the will shall be proved, as well as attested, by a specific number of witnesses. If such proof were to be required from each subscribing witness, validity of wills would be made to depend upon the memory and good faith of a witness, and not upon reasonable proof that all the requirements of the statute had, in fact, been complied with."

The authorities elsewhere are equally explicit in support of the same doctrine, as may be seen by reference to the cases cited in Judge BALDWIN's opinion, and in *Tarrant v. Ware*, 25 N. Y. 425; *Nelson v. McGiffert*, 3 Barb. Ch. 158; *Jauncey v. Thorne*, 2 id. 40.

The law would seem, therefore, to be too well settled to be called in question.

It is now to be considered whether the will in this case was properly executed. I think it may be regarded as proved beyond controversy that the will was written at Mrs. Hatcher's request; that every word of it was dictated by her; that it is in conformity with her wishes; that it was subscribed by Dr. Grymes in her presence and at her request, and that she was at that time possessed of sound and disposing mind and memory.

It may be assumed also, as fully established by the evidence, that Clarke, the other attesting witness, was present in the room when the will was written, when it was signed by the testatrix, acknowledged by her and attested by Dr. Grymes; and was a witness to these acts as they were successively performed. In regard to these matters there can be no solid ground for dispute. The real difficulty in the case is in ascertaining whether Clarke subscribed the will "in the presence of Mrs. Hatcher." Was she at that time in a

condition to know and understand that the paper he was attesting was the same she had caused to be written and had signed and acknowledged as her will? When she was told by her physician that she must die very soon, she said she wished Mr. Brooks, an attorney, sent for. She was told he could not get there. She again peremptorily said, I want Mr. Brooks sent for. Being told it was useless, he could not reach there in time, she called Mr. Cheatham and asked him to bring pen, ink and paper, which he did, and the will was written as she dictated. She was asked if that was the disposition she desired of her property? She said yes; except she wished to leave Bettie Ferguson \$1,500, and to Desdie Lester her gold watch. This clause being added, the will was read over to her a second time. She said it was as she wished it. She was asked if she was ready to sign. She said no; she wanted to read it—called for her glasses and seemed to be reading it—then called for a pen. It was suggested that Mr. Cheatham would sign for her. She said no; she generally did that sort of business herself. She took the pen and her hand trembled; she then handed it to Cheatham, saying, you sign my name and I will make my mark; which was done. Dr. Grymes then said, do you wish me to sign it as a witness? She said she did. And he then subscribed his name in her presence.

All will agree that up to this period Mrs. Hatcher displayed good sense, clearness of mind, and a resolute purpose, with regard to the disposition of her property. After Dr. Grymes had signed the will, Mr. Cheatham said to Clarke, who was in the room, you can also act as a witness. And there is no doubt that Clarke then expected to become a *subscribing* witness. He was, however, not then further called on. The reason was that none of those present supposed it to be necessary for two witnesses actually to subscribe the will.

Immediately after these occurrences, Clarke was sent for a Mrs. Morris, a lady living a mile and a half distant, to assist in attending to Mrs. Hatcher. During his absence it was ascertained by a message from Mr. Lester, that two subscribing witnesses were necessary. It became the subject of conversation in the room in the presence of Mrs. Hatcher. To use the language of the witnesses, it was talked about that it was necessary for Clarke to sign. A messenger was at once dispatched for Clarke. When he returned and entered the room Dr. Grymes remarked it was necessary for

him to sign, saying to Clarke, you were present and saw Mrs. Hatcher sign it, and heard her acknowledgment when I signed it? He said yes, he was. He was told it was necessary to sign in the presence of Mrs. Hatcher. The will was taken from a chair and subscribed by Clarke within a few feet and directly in front of her. Dr. Grymes says he is satisfied she was then entirely conscious; that she could see, and knew what we were doing when he signed; that he had a conversation with her just before Clarke came in, and that she retained her consciousness for some time after the will was subscribed by Clarke. He took it for granted on calling for Clarke she wanted her will, which disposed of her property, properly attested, and if she disapproved of the attestation by Clarke she was in a condition to show her disapprobation if she chose.

Clarke, on the other hand, says her eyes were set in death. He admits, however, "he did not know any thing about her mind at the time." "He had reason to think it was not good." The reason he assigns is she did not say any thing when he signed and when the will was read to her. He further says that when Dr. Grymes and Mr. Cheatham called upon him to sign, Mrs. Hatcher could hear—everybody could hear—and if she was conscious, she must have known they called upon him to sign the paper as her will; and she was in a position to see, as he was in front of her, only about three feet from her. The testimony of Clarke, it will thus be seen, does not show Mrs. Hatcher's want of capacity or unconsciousness at the time. It merely suggests a doubt upon that subject. Whatever weight it might otherwise have had in this case is impaired, if not wholly destroyed, by the circumstances surrounding him. In the first place, it is apparent he is a very illiterate witness, whose mere opinion upon a question of testamentary capacity is of but little value. In the second place, by his act of subscribing the will, he solemnly attested the capacity of the testatrix, and when he undertakes to invalidate the will his testimony is to be received with suspicion. It was said in *Kinleside v. Harrison*, 2 Phill. 449, that no fact stated by such a witness can be relied on when he is not corroborated by other witnesses.

In the third place, it is certain that his testimony on the trial was directly at variance with his previous statements made shortly after the will was executed. He is proved to have said, on several occasions, that he agreed with Dr. Grymes in regard to the acknowledgment of the will by the testatrix, and also with regard to

her condition when he subscribed the will. Either he had been tampered with or he had forgotten *what* had occurred at the time of the execution of the will.

I do not accuse him of falsehood willfully uttered ; his conduct shows the wisdom of the rule which authorizes the material facts to be proved by one of the subscribing witnesses, or even by any other competent testimony, and if it were otherwise the proof of a duly attested will might be defeated by the forgetfulness or perjury of some of them.

On the other hand, Dr. Grymes was at the time, and had been for several years, Mrs. Hatcher's family physician. He had been in constant attendance upon her during the three weeks' illness preceding her death. He is proved to be a man of high character and unquestioned veracity. In every view his evidence is entitled to the highest consideration.

In *Burton v. Scott*, 3 Rand. 399, 403, Judge CARR said : "The opinion of a witness as to the sanity of a person depends for its weight on the capacity of the witness to judge, and his opportunity. Physicians are considered as occupying a high grade on such questions, both because they are generally men of cultivated minds and observation, and because, from their education and pursuits, they are supposed to have turned their attention more particularly to such subjects, and therefore to be able to discriminate more accurately, especially a physician who has attended the patient through the disease which is supposed to have disabled his mind."

The evidence of T. M. Cheatham confirms that of Dr. Grymes in every particular. Throughout they fully concur in their statements and recollection of the occurrences at the time the will was signed and acknowledged by Mrs. Hatcher, and when it was attested by Clarke. Speaking with reference to the latter occurrence, this witness says : "I saw nothing to lead me to believe she was not conscious then. She had been talking just before he (Clarke) came ; it was talked about the necessity of Clarke signing in her presence ; don't know whether she engaged in the discussion ; my conclusion and impression were that she heard the discussion, and that Clarke was sent for with her approbation and according to her wishes."

It is very true that Mr. Cheatham is a devisee under the will, and that fact detracts somewhat from the force and value of his statements. But his conduct throughout seems to have been characterized

by good sense and absolute fairness. His testimony is remarkably clear and consistent, and bears the impress of truth.

We have, therefore, the evidence of two competent witnesses (one of them the family physician) in support of the capacity of the testatrix, and the formal execution of the will. We have proof of that capacity in the intelligent conversation of the testatrix but a few minutes before the attestation of Clarke, and all the presumptions in favor of its continuance. Against all this, we have the doubtful opinions of another witness in contradiction of his previous opinion, expressed soon after the will was executed. Here then, is a will executed in conformity with all the requirements of the statute, signed and acknowledged in the presence of two witnesses, whose attestation was in the presence of the testatrix.

If it is to be defeated it is solely upon a mere presumption that the testatrix was in an unconscious state at the time the last attesting witness subscribed his name. This presumption is based mainly on the fact that she did not speak at the time, or request the witness to attest the will.

The cases are numerous in which wills have been established although the testator did not request the witness to sign — when the request was made by some one in his presence, and therefore, presumably with his consent.

In the case of *Inglesant v. Inglesant*, 3 L. R. P. & D. 1872-75, p. 172, the testatrix was an old lady ninety years of age, whose will was executed in the house of a Mrs. Lee, and the question there, as here, was, whether the witness had attested the will at the request of the testatrix. Sir J. HANNEN, in commenting upon the evidence, said: "The peculiarity of this case is, that the two attesting witnesses agree in this, that the signature of the deceased was put to the will before one of them came into the room. Both agree that Mrs. Lee, in the presence of the testatrix, upon the second witness coming into the room, requested him to put his name under the name of the testatrix. Both also agree that the testatrix did not say any thing or do any act in reference to the will after the two witnesses were there, and consequently the question turns upon this, whether the words used by Mrs. Lee can be taken to be the words of the testatrix." After some discussion of the authorities, after citing and commenting upon the case of *Faulds v. Jackson*, decided by Lord BROUGHAM, the learned judge proceeds to say, "That case, therefore, is, as nearly as can be, parallel with the pres-

ent, and the only question is, is there evidence which leads me to conclude that the words used by Mrs. Lee were heard by Mrs. Inglesant, the testatrix? If so, the case applies. As the evidence stands, I must adopt the view that the words were heard by the testatrix. Mrs. Greaves had just before been conversing with her, and no question has been put to any witness to raise a doubt that the testatrix did hear the words used by Mrs. Lee. Moreover the execution was undoubtedly in furtherance of the wishes expressed by the testatrix when she sent for the witness."

In *Rutherford v. Rutherford*, 1 Den. 33, it was held that the jury might have found a sufficient request to one of the witnesses, where it was made by the draftsman of the will, in the presence of the testatrix. In *Peck v. Cary*, 27 N. Y. 9-10, DENIO, C. J., said: "Thereupon Morgan, the draftsman of the will, and who was attending to its execution, called upon three persons who were within hearing to come forward and witness the will, and they came. I think they should be held to have signed at the request of the testatrix." See also *Nelson v. McGiffert*, 3 Barb. Ch. 163.

In *Smith v. Smith* 2 Lans. 266, the Supreme Court of New York said: "The witnesses signed, knowing what paper they were attesting. The testatrix was present when they signed, and made no objection. The person whom she had employed to draw the will requested the witnesses to sign, and the request being made in her presence, is, in law, her request." See also *Moore v. Moore*, 2 Brad. 261. Some of these are decisions by the highest courts of New York, where there is a statute expressly requiring that the witness must attest the will at the request of the testatrix.

The authorities, I think, are almost uniform in holding that a request made by a person in the presence of the testatrix will be held to be the request of the latter, if no objection is made; and an attestation thus made is presumed to be with the concurrence and wishes of the testatrix. See Williams on Ex'rs, 117, marg. 99, and cases there cited. *Rogers v. Diamond*, 13 Ark. 475; *Trustees, etc., of Auburn v. Calhoun*, 25 N. Y. 422.

In the present case it is true that the testatrix at no time requested Clarke to attest her will — neither did she request Dr. Grymes to do so until she was asked the question. It is very probable she did not know that a subscribing witness was necessary, and no doubt she supposed, as did the others, that the attestation of one was sufficient until the subject was discussed in her presence. There is no doubt

she heard Mr. Cheatham say to Clarke he could also act as a witness. There is no doubt she was well aware of the information received from Lester, that another witness was necessary, as it was the subject of conversation about the time she is proved to have conversed with persons in the room. There is no doubt that when Clarke entered the room she heard Dr. Grymes and Mr. Cheatham request him to sign the will—she heard and she understood all this if she was conscious—and that she was conscious, I have already attempted to show from the testimony of unimpeached witnesses, and from the surrounding circumstances; that all the witnesses and friends so thought at the time, is evident from the fact that Clarke was requested to take his position directly in front of Mrs. Hatcher, so that she could plainly see him subscribe the will.

An unfavorable inference is sought to be drawn from the remark made by Dr. Grymes to Clarke, that Clarke was present when Mrs. Hatcher signed the will and heard her acknowledgment. It is said that Clarke was sent for and reminded of what had occurred in his presence, because it was well understood that Mrs. Hatcher was then in an unconscious state. The evidence shows that although Clarke did not actually sign his name, he was considered as a witness to the transaction—he was requested to witness the reading of the will. He was not then requested to sign because it was thought that one subscribing witness was sufficient; but when it was ascertained that two were necessary, it very naturally occurred to them, that as Clarke had witnessed the previous proceedings, including the reading, the signature and acknowledgment, he was the proper person to attest them by the actual subscription of his name.

This view is borne out by the evidence, and is consistent with the integrity of the witnesses.

The other view supposes they are not only guilty of perjury, but that they conspired to use Clarke as an instrument to accomplish a gross and palpable fraud.

Again, it is said that Cheatham, the chief legatee, was the draughtsman of the will. That circumstance does not invalidate the will; it simply imposes upon the court the duty of increased vigilance in seeing that the will was fairly executed, and that it does in fact carry out the wishes of the testatrix with respect to her property. See *Riddell v. Johnson*, 25 Gratt. 152. It is perfectly certain that this will is in conformity with the wishes of Mrs. Hatcher.

It is the precise disposition she desired to make of her property.

She had no children or descendants—her relations were very numerous, scattered over several States, the names and even residences of many of them, probably unknown to her—for most of whom she could have no sort of affection. Her property, divided among so many, could be of little value to any one. Nothing was more natural than that she should prefer to give it to those who had been kind to her and were bound to her by the ties of affection, blood and long continued service and devotion.

Very unexpectedly to herself and friends, she was suddenly taken dangerously ill. So soon as she was apprised of her condition, she manifested the most eager wish to make her will. She would not be denied or delayed. No one had suggested it; no one had even hinted at any special bequest; it was written as she dictated, without comment or remark. And when, as she supposed, the instrument was complete, she quietly composed herself to die. If her wishes are to be defeated by the courts, it will be upon an inference. Lord MANSFIELD once said that in such a case as this, the courts lay hold of a very light presumption.

In *Van Alst v. Hunter*, 5 Johns. Ch. 159, Chancellor KENT, after quoting from Voet, in his Commentaries on the Pandects: "*Licet enim non sani tantum, sed et in agone mortis positi, seminece ac balbutiente lingua voluntatem promentes, recta testamenta condant si modo mens ad hunc valeant*," proceeds to say: "It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attention due to his infirmities. The will of such an aged man ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent means, but contains those very dispositions which the circumstances of his situation and the course of the natural affections dictated." I think these just and noble sentiments fully apply to the case in hand, and I am for admitting the will to probate. *Judgment reversed.*

CHRISTIAN and BURKS, JJ., concurred in the opinion of STAPLES, J.

ANDERSON, J., doubted as to the consciousness of the testatrix at the time Clarke signed the paper, but waived his doubt, and concurred in the opinion of STAPLES, J.

MONCURE, P., dissented.

BANK OF GREENSBORO' v. CHAMBERS.

(30 Gratt. 202.)

Marriage—ante-nuptial settlement—power of wife to convey under.

C., a tobacco manufacturer, by ante-nuptial contract, conveyed his real and personal property, including his dwelling-house, in trust for his intended wife for life, with remainder to their children, for the expressed purpose of providing a home for her and the children. After marriage, conducting his business in the name of the wife, for the purpose of borrowing money for the business, he and the wife and the trustee joined in a conveyance of the dwelling-house to a trustee for that purpose. *Held* void as to the wife.

SUIT against Chambers and wife and Patrick, to subject a house and lot to a debt due from Mrs. Chambers. Before marriage Chambers was engaged in manufacturing tobacco. An ante-nuptial agreement, through Patrick as trustee, reciting that Chambers was "desirous of securing and providing a comfortable home and proper maintenance and support of his said intended wife, and any child or children there may be of the marriage," conveyed all his real and personal property to Patrick in trust for the separate use of Mrs. Chambers for life, remainder to the children, with power of sale and reinvestment upon the written request of Mrs. Chambers, when she "should deem it for the best interest of herself and family." Other provisions appear in the opinion. After the marriage, the business was conducted in the name of Mrs. Chambers; and Chambers, Mrs. Chambers, and Patrick conveyed to the plaintiffs, in trust, as security for loans and discounts, the dwelling-house embraced in the ante-nuptial agreement, the money being furnished to Chambers upon Mrs. Chambers' notes, and used in the business. The court below dismissed the bill.

E. E. Bouldin and Marshall & Johns, for appellants.

Jones & Bouldin and Robinson, for appellees.

BURKS, J. It is conceded by the counsel on both sides that the estate of the appellee, Mrs. Chambers, in the property embraced in the ante-nuptial contract and deed of settlement on the 12th day of December, 1868, is a separate estate, and it was further very properly conceded in argument by one of the counsel for the appel-

lants, that this estate of Mrs. Chambers is limited to the term of her natural life. What are her powers over it, is the question presenting most difficulty. Has she the power to dispose of it, or to incumber and charge it with the payment of her debts in such manner and to such extent as would lead to an alienation of it?

It is the settled law of this State that a married woman is regarded in equity as the owner of her separate estate, and as a general rule, the *jus disponendi* (qualified as to the mode of disposal of the *corpus* of real estate), incident to such estate, unless and except so far as it is denied or restrained by the instrument creating it; but it is subject to such limitations and restrictions as are contained in the instrument, which may give it *sub modo* only, or withhold it altogether. *McChesney v. Brown's Heirs*, 25 Gratt. 393; *Nixon v. Rose*, 12 id. 425; *Penn v. Whitehead*, 17 id. 503.

As incident to this *jus disponendi*, she may charge such estate with the payment of her debts. She may charge it as principal or surety, for her own benefit, or that of another. She may appropriate it to the payment of her husband's debts. She may even give it to him if she pleases, no improper influence being exerted over her. She may extend the charge to the whole, or confine it to a part of the estate. If no specific part is appointed for the payment of the debt, the fair implication is that the whole was intended to be made liable. If, on the other hand, only a part of the estate, expressly or by fair inference, is designed to be charged, no liability whatever can attach to the residue. The liability of the estate can arise only out of the supposed intention of the wife to charge it, and no pecuniary engagement can be a charge on the estate, which is not connected by agreement, express or implied, with such estate. *Burnett v. Hawpe's Ex'or*, 25 Gratt. 481; *Darnall v. Smilk's Adm'r*, 26 id. 878.

We do not find in the deed of settlement in this case any express interdiction or limitation of the *jus disponendi*, and of the incidental power to incumber and charge the separate estate to an extent involving alienation, but if by a fair construction of the instrument, the exercise of these powers would be inconsistent with the plan and scheme of the settlement, and would defeat the plain intent pervading the deed, they must be considered as much forbidden as if expressly denied. The exclusion of the power of alienation, as said by Judge MONCURE, in *Nixon v. Rose, trustee, supra*. "is often, if not generally, necessary to effectuate the objects of

the settlement, and to protect the wife as well from her own weakness, as from the power and influence of her husband. The law therefore favors the intention to exclude it, and will give effect to such intention whenever it can be ascertained by a fair construction of the instrument."

In the construction of every instrument, the paramount rule is so to construe it, as if possible to give effect to every part of it, and in order to discover the intention of the parties, we look not only to the terms of the instrument, but to the subject-matter and the surrounding circumstance.

The settlement in this case appears to have been wholly of the property of the husband, and it would seem it was all he had. To what extent, if at all, he was indebted, is not disclosed. The property consisted in part of a lot with improvements, on which he resided, in the town of Danville. Its value does not appear, except that on the pledge of it as security, the appellants agreed to advance from time to time a sum of money not exceeding at any one time \$25,000. It must therefore have been regarded as valuable. The other property conveyed consisted of a small tract of land (thirty-five acres), a wooden factory-house with an unexpired lease of the ground on which it stands, divers fixtures for the manufacture of tobacco, household furniture, several horses and other articles of personal property. From the enumeration and description of the property, it is evident that the property of principal value in the settlement was in the house and lot in Danville, the home and residence of the grantor.

Looking to the deed, we cannot fail to discover that the leading intent was not only to provide, but to secure a *home*, maintenance and support, not for the wife only, but also for the children of the marriage. This is quite apparent from the preliminary recitals in the deed: "Whereas the said A. B. Chambers is desirous of securing and providing a comfortable home and proper maintenance and support for his intended wife, and any child or children there may be of the marriage between them: Now, this indenture witnesseth," etc.

This declared purpose to provide and secure a "home" for the wife and children is, by a subsequent provision of the deed, extended to the husband; for after conferring upon the wife the power to have the property sold by the trustee and the proceeds invested in other property subject to the trusts impressed on the property conveyed, it is expressly stipulated as follows:

"But it is also agreed and understood between all the parties hereto, that the said A. B. Chambers shall be allowed to live in and upon said property, and the same shall be *his home* during the term of his natural life, though not subject to his control or management, nor liable for his contracts; and in case said property is sold, and the proceeds invested in other real property, then he shall be entitled to *a home* upon the same, as upon that herein conveyed."

Again, the only sale of the property expressly authorized by the deed is to be made by the trustee "upon the written request" of the wife, if at any time after the consummation of the marriage "she should deem it for the best interest of herself and *family* that the said real and personal estate herein conveyed should be sold, and the proceeds of such sale invested," etc.

Thus it would seem, that the leading intent of the settlement was to provide for the "*family*"—to secure a *home* for all, and the common support and maintenance of the wife and children.

Accordingly, in harmony with this intent, the general features of the scheme were to settle the whole property to the separate use of the wife during her life, and to limit the equitable fee to the children of the marriage, with power in the wife to make appointment amongst them, observing the principle of equality, or on failure of issue of the marriage, as it would appear, to appoint the children of the husband by a former marriage to take, observing the same principle of equality in the appointment; and on failure of issue of the marriage and default of appointment to the children of the husband by the former marriage, at the death of the wife, she having survived the husband, to limit the fee to "those to whom by the laws of the State of Virginia it would go by virtue of their relationship to the said A. B. Chambers (the husband)." The only contingency in which no limitation is provided, is the death of the wife in the life-time of the husband without issue of the marriage and without appointment by the wife among the children of the husband by the former marriage. Upon the happening of that contingency, the fee, by operation of law, would result to the husband, the grantor in the settlement.

Now, this whole scheme would seem to be designed to *preserve* the property, settle and secure its use and enjoyment to the *family*—to provide and secure a *home* for them and support and maintenance for the wife and children. The only change in the property which is expressly authorized is a sale, on the written request of

the wife, and reinvestment of the proceeds in other property, subject to the same trusts which are impressed on the property conveyed, if the wife should deem such sale and investment to be "for the best interest of herself and family."

It is true, the trustee is directed to "hold, use and manage" the property * * * "for the sole and separate use, benefit and disposal of the wife, but the word "disposal" may appropriately be referred to the sale for reinvestment which has been mentioned, and the language descriptive of the control of the estate by the wife, while *per se* and disconnected from the other parts of the instrument it might not import with certainty any restraint against alienation, should, in its relation to other provisions, have a restricted meaning given to it. The language is, that "the said trustee will suffer and permit the said Fanny E. Major (the intended wife), after her marriage aforesaid shall have been consummated, to have, occupy, use and enjoy, in quiet and peaceable possession during the term of her natural life, all the property, both real and personal, herein conveyed, assigned and transferred, without interference on the part of any one, and of him, the said trustee, save and except as to such acts and things as he may be required either in law or equity to do and perform by virtue of his office of trustee aforesaid."

Bearing in mind the leading intent of the settlement, to wit: to provide and *secure a home* and support and maintenance for the *family*, the construction of the language just cited should be such as, if possible, to give effect to that intent, not to defeat it. The words "have, occupy, use and enjoy" may, and we think should, be construed as used with particular reference to the words which follow, relating to the possession of the property, the intent being that she should have "quiet and peaceable possession * * * without interference on the part of any one and of him, the said trustee * * * ." These words too were the more proper as serving to qualify those preceding, by which it was declared that the *trustee* should "hold, use and manage" the property.

The language which immediately follows, to wit: "the understanding and agreement between the parties hereto being, in consideration of the premises and of the marriage aforesaid, to settle said property to the sole and separate use and benefit of the said Fannie E. Major (the intended wife), and after her, to any child or children which there may be of the marriage between herself and

the said A. B. Chambers, and in such manner as shall be hereinafter named," was more particularly intended to declare what had not been done before the disposition of the estate after the death of the wife. It had already been declared that her interest should be for her life, that the marital rights of her husband should be excluded, and it only remained to limit the estate after her death. Some of the property embraced in the deed of settlement was personal property, which might perish from use or from natural causes. In the contingent limitation of the property to the heirs or next of kin of the husband after the death of the wife, the words "what remains of the same" are used, we think, in reference to the possible diminution of the estate from the causes before mentioned.

We think, taking the whole deed together, the fair construction is, that it was intended that the property should be kept together during the life of the wife, so as to furnish a home for the family and for the common support and maintenance of the wife and children, and that it was never intended that the wife should have the power (except for the purpose of reinvestment, as specially provided), to alien the property, or to incumber or charge it in such manner and to such extent as to lead to alienation. The exercise of such power would be inconsistent with the scheme of the settlement, and effectually defeat the leading and prevailing intent indicated by the deed.

It follows that, in our judgment, the claim of the appellants, whether under the deed of trust relied on, or under the alleged agreement of Mrs. Chambers to charge the estate with the payment of the money advanced, cannot be sustained. She had no right to charge her own separate estate, in the manner claimed, with the payment of the money advanced, nor can the arrangement made be sanctioned as a legitimate exercise of the power given by the deed of settlement to make sale of the property and invest the proceeds.

The money advanced on the credit of the trust property was to be used in a hazardous business, and the purposes to which it was to be applied could, in no just sense, be called an investment under the terms of the deed of settlement. The appellants, when they advanced the money, knew how it was to be employed. The deed of trust under which they claim shows on its face that they had this knowledge. With this knowledge, and a full knowledge of the deed

of settlement and all its provisions, they advanced the money at a ruinous rate of interest (eighteen *per centum per annum*), and took a deed on the trust property to secure its payment. The deed is not a valid security, nor are the notes which were given for the loan, nor any other engagement or undertaking of Mrs. Chambers, a valid charge upon the trust property or upon any estate or interest which she has in it.

Judicial decisions, based mainly on construction, can seldom be relied on as precedents for construction in other cases, for the obvious reason, that the instruments construed differ, more or less, in their terms, subject-matter and attending circumstances. They are sometimes alike, but *nullum simile est idem*. The case of *Penn v. Whitehead*, 17 Gratt. 503, in some of its features, resembles the case in judgment, but is very unlike it in other essential particulars. In that case, the settlement was post-nuptial, and the consideration flowed wholly from the wife. The property settled consisted of some slaves and other personal estate, of the value, all together, of little more than one thousand dollars. The husband was insolvent, and there was a numerous family of children. The estate was limited to the separate use of the wife for her life, to remain in her possession for the support and maintenance of herself, her issue and family, and for no other purpose, and after her death, to her children. The profits of the estate were wholly inadequate to the support of the family, and it was held that the wife was not restrained by the settlement from engaging in a small mercantile business, to be conducted by her husband and his sons, on the credit of the separate estate. In the case before us, the consideration flowed from the husband. The settlement was before and in contemplation of marriage. The property of chief value was a house and lot, the residence and home of the husband. The primary object of the settlement was to provide and *secure* this *home* to the wife and any children there might be of the marriage. While under the circumstances it may reasonably have been supposed to have been in contemplation of the parties in making the settlement in the first case, that a small mercantile business might be undertaken on the credit of the estate, it would seem wholly inconsistent with the intent and objects of the settlement in the present case to permit the wife to engage in the hazardous business of buying, selling and manufacturing tobacco on the credit of the property dedicated and set apart to her as a home for herself and her family; and if the ad-

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venture should prove disastrous as in this case, she would be deprived of the very home intended to be secured to her and her family.

In the petition, briefs and oral arguments of counsel, several interesting questions have been presented for our consideration, such as whether the bill should not have been in the corporate name of the "Bank of Greensboro'," and whether the bill, in its present form, may be treated as such a bill; whether the trustee in the deed of trust to the appellants was competent, as notary public, to take and certify the acknowledgment and privy examination of Mrs. Chambers as a party to said deed; whether the contract for the loan made and security taken by the appellants was a Virginia contract or a North Carolina contract, and if the latter, whether the contract and security (being for a higher rate of interest than is allowed by the laws of North Carolina) can be enforced on a bill by the appellants in a court of equity in Virginia.

The view we have taken of this case makes it unnecessary to decide these and other incidental questions raised.

We are all of opinion, for the reasons stated, that there is no error in the decree of the Circuit Court dismissing the bill of the appellants, and that said decree should therefore be affirmed.

Decree affirmed.

BURKHOLDER V. LUDLAM.

(30 Gratt. 255.)

Specific performance — of parol promise of voluntary conveyance.

A. offered his son-in-law B. who was living and in successful business in an other town, that if he would remove to A.'s place of residence he would give B.'s wife a lot and an unfurnished house thereon. B. accordingly removed at expense, furnished the house with his own and his wife's earnings, and occupied it twelve years, but no conveyance was made as promised. C. then became insolvent, and then in consideration of five dollars and love and affection, conveyed the house and lot to a trustee for B.'s wife. *Heid*, that the conveyance was not subject to the liens of prior judgments against C., but would be upheld.*

* See *Kertz v. Hibner* (55 Ill. 514), 8 Am. Rep. 665; *Hardesty v. Richardson* (44 Md. 671, 22 Am. Rep. 57; *Marling v. Marling* (9 W. Va. 79), 27 Am. Rep. 535.

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BILL by judgment creditors of William Crumpton, to subject to their judgment liens real estate conveyed by him to Carroll as trustee for Mrs. Burkholder, his daughter, for life, remainder in fee to her children in consideration of five dollars and "natural love and affection." The plaintiffs had judgment below. The facts are stated in the latter part of the opinion.

John W. Daniel, for appellant.

Mosby & Brown and *John H. Lewis*, for appellees.

BURKS, J. [Omitting minor matters.]

The principles of several recent decisions of this court, reported in 28 Gratt., to wit: *Floyd, trustee, v. Harding*, 401, 407; *Hicks v. Riddick*, 418; *Borst v. Nalle*, 423, 432, 433; *Shipe v. Repass*, 716, 723, establish the proposition that the lot claimed by the appellants is not subject to the lien of the judgments of the appellees, Ludlam, Heineken & Co., and Taliaferro & Musgrove, if when these judgments were recovered against William Crumpton, the appellants, or either of them, had a valid, equitable title to said lot.

Whether they had such title, therefore, is the only question to be considered and determined.

The claim of the appellants to the lot in question, at the date of the judgments, was under a parol agreement, and if it were a contract for sale, to take the case out of the operation of the statute of fraud and perjuries, and entitle the appellants to specific execution, on the ground of part performance, it is well settled that the agreement and acts of part performance must be clearly proved, and it must appear that the agreement is certain and definite in its terms, that the acts proved in part performance refer to, result from, or were done in pursuance of the agreement proved, and that the agreement has been so far executed that a refusal of full execution would operate a fraud upon the party seeking execution and place him in a situation which does not lie in compensation. *Wright v. Pucket*, 22 Gratt. 370.

The appellants, however, do not claim that the agreement was a contract for sale, but a parol gift of the lot. It becomes important, therefore, to inquire whether, as donees, under the facts and circumstances proved, they occupied any worse attitude than if they had been purchasers for value; whether they could have demanded a conveyance of the legal title without condition.

It is certainly true, that courts of equity do not aid in the execution of contracts or agreements purely voluntary ; and notwithstanding respectable authorities to the contrary and what Mr. Justice STORY pronounces the "very able" reasoning of Lord Chancellor SUGDEN, in *Ellis v. Nimmo* (Loyd & Goold, 333), it would seem also to be now the general rule that such aid will not be given to carry into execution contracts or agreements based wholly on a meritorious consideration — that is, the moral duty of a parent to make provision for his child, or of a husband to make like provision for his wife. 1 Story's Eq. Jur., § 793, and authorities cited in the notes.

But whether a court of equity will compel the conveyance of the legal title of land claimed under a parol gift, supported by a meritorious consideration, and by reason of which the donee has been induced to alter his condition and make large expenditures of money in valuable permanent improvements on the land, is a question on which the authorities are not agreed.

Some adjudged cases determine the question in the negative. *Pinckard & Pool v. Pinckard's Heirs and others*, 23 Ala. 649; *Rucker v. Abell*, 8 B. Monr. 566; *Adamson v. Lamb*, 3 Blackf. 446. The doctrine of other cases is, that tho donee, under such circumstances, becomes the equitable owner of the land, and may rightfully demand the legal title. *Syler's Lessee v. Eckhart*, 1 Binn. 378; *Eckert v. Eckert*, 3 Penn. 332; *Eckert v. Mace*, id. 364; *Stewart v. Stewart*, 3 Watts, 253; *France v. France*, 4 Halst. Ch. 650; *Lobdell v. Lobdell*, 36 N. Y. 327; *Bright v. Bright*, 41 Ill. 97; *Low v. Henry*, 39 Ind. 414; *Young v. Glendenning*, 6 Watts, 509; *Mahon v. Baker*, 2 Casey, 519; *Atkinson v. Jackson*, 8 Ind. 31; *Freeman v. Freeman*, 43 N. Y. 34; s. c., 3 Am. Rep. 657; *Peters v. Jones*, 35 Iowa, 512; *Neale v. Neales*, 9 Wall. 1.

The ground of these last-named decisions is, that the parol gift, with the concurring facts established, rests on the same foundation with a parol contract for sale partly performed, and that equity will carry both into complete execution, notwithstanding the statute of frauds and perjuries, for the same reason, to wit: to prevent the statute, which was designed to guard against fraud, from being used as a means to perpetrate fraud.

Chief Justice TILGHMAN, in delivering the opinion of the Supreme Court of Pennsylvania, in the case of *Syler's Lessee v. Eckhart*, *supra*, uses this language: "Although the courts are not disposed to

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extend the principles on which parol agreements concerning lands have been confirmed, farther than they have already been carried, yet they are bound by what has been decided. It has been settled that where a parol agreement is clearly proved, in consequence of which one of the parties has taken possession and made valuable improvements, such agreement shall be carried into effect. We see no material difference between a sale and a gift; because it certainly would be fraudulent conduct in a parent to make a gift which he knew to be void, and thus entice his child into a great expenditure of money and labor, of which he meant to reap the benefit."

Although the agreement in *King's Heirs v. Thompson*, 9 Peters, 204, was not specifically executed, it was because of the uncertainty in the terms of the agreement. It was there said that the expenditures for the improvements constituted a valuable consideration. See also *Rerick v. Kern*, 14 S. & R. 267; *Sheppard v. Bevin*, 9 Gill, 32.

An early decision (1811) of this court seems to accord with the Pennsylvania cases, *supra*. A testator having put his daughter's husband into possession of a leasehold tract of land and delivered him the lease, permanent improvements also being made by the son-in-law, with the assistance of the family, and a parol declaration by the testator, that he had given him the land in consideration of his having married his daughter and to prevent his moving to Kentucky, being proved, it was decided that the son-in-law had an equitable title to the land for the time the lease had to run, and to a release of the legal title from the heirs or executors, according as the interest conveyed by the lease might be greater or less. *Shobe's Ex'rs v. Carr*, 3 Munt. 10. This was a decision by a court consisting of Judges ROANE, BROOKE and CABELL, and they were unanimous in the opinion.

We do not find the principles of this decision denied or questioned in any subsequent decision of this court which has come to our knowledge. In *Darlington v. McCooles*, 1 Leigh, 36; *Reed's Heirs v. Vannorsdale and wife*, 2 id. 569; *Pigg v. Corder*, 12 id. 69; *Cox v. Cox*, 26 Gratt. 305, specific execution was denied, but there is nothing to be found in either of these cases in conflict or at all inconsistent with the decision in *Shobe's Ex'rs v. Carr*, *supra*. On the contrary, the reasoning of the judges in some of these cases would rather seem to confirm the principles of that case.

In *Reed's Heirs v. Vannorsdale*, no expense or loss was incurred by Charles Reed in foregoing his intention to remove to the west, and in moving to and settling on the land promised him by his brother, James Reed; and Judge CABELL took occasion to say that if it had appeared that such expense or loss had been incurred, he should have been of opinion that specific execution ought to have been enforced.

The following are the material facts in the case before us: William Crumpton, the father of the female appellant, Mrs. Burkholder, resided in the city of Lynchburg in 1852, and until he removed to Danville, in 1865 or 1866. In 1852, the date of the marriage of his said daughter, he owned a good estate, estimated at from \$50,000 to \$75,000, and was free from debt. At the institution of this suit he had become insolvent. The year after his marriage, Burkholder purchased the lot in question, then unimproved, at the price of \$50, intending to build upon it. Finding himself without sufficient means to accomplish this, he turned the lot over to Crumpton, who paid for it and took the title to himself, declaring that he intended it for his daughter, Mrs. Burkholder, and commenced building a house upon it for her. Soon after this Burkholder removed with his family to Wytheville, and there engaged in his business, which was that of an architect, practical builder, and manufacturer of agricultural implements. While his business was in a promising condition, Crumpton proposed to him that if he would break up his business at Wytheville and return to Lynchburg, his wife "should have the lot, together with the unfinished improvements thereon, as her own property." Burkholder acceded to this proposition, returned to Lynchburg with his family, paying his own expenses of removal, and took possession of the lot under the agreement mentioned, and has had and held actual, continuous, notorious, exclusive possession, with claim of title under the agreement thence hitherto. The possession commenced in the year 1855 or 1856. At the time he and his wife and family entered into possession, the building on the lot was about one-third completed. He finished the building out of his own means and means saved by the earnings of his wife. It must have been completed as early as 1858, for in that year the lot and buildings were assessed for taxation at the value of \$2,150. The delay in making the deed of conveyance was caused by inattention. The house and lot was evidently intended as a home for Mrs. Burkholder and her

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family, which included nine infant children at the filing of the bill in this case, and her right was never denied or called in question by her father, or any other person, until the institution of the suit. It was proved that Crumpton had made advancements to his children, and that the house and lot held by Mrs. Burkholder did not exceed in value the property advanced to any one of his other children. The two debts, upon which the judgments sought to be enforced against the lot were recovered, were contracted, the one in the year 861 and the other in 1865.

Upon these facts, clearly and satisfactorily proved, without laying down any general rule, we are of opinion that at the date of the judgments of the appellees, Ludlam, Heineken & Co., and Taliaferro & Musgrove against William Crumpton, the appellant, Mrs. Burkholder had a valid equitable title to the house and lot in question, and that the said judgments are not liens thereon.

The decree of the Circuit Court of the city of Lynchburg must therefore be reversed, the bill of the appellees dismissed as to the appellants, and the cause remanded to the said Circuit Court for further proceedings against the remaining defendants, in order to final decree as to them.

Decree reversed.

BOWLER V. HUSTON.

(30 Gratt. 206.)

Judgment—of another State—impeachment of, for want of jurisdiction—partnership—dissolution.

A judgment rendered in another State, against all the former members of a dissolved partnership, will not personally bind one of the partners who was not served with process and did not appear, although by the law of that State such judgment is enforceable against the joint property; and in an action on such judgment here, such partner may show that he was not served and did not appear, although the record states that he was summoned and appeared.*

ACTION of debt on a judgment. The opinion states the facts. The plaintiff had judgment below.

* See *Gilman v. Gilman*, 30 Am. Rep. 646.

John Dunlop, for appellant.

Robert Howard, for appellee.

MONCURE, P. This is a writ of error to a judgment rendered by the Circuit Court of the city of Richmond on the 2d day of November, 1874, in an action of debt brought in said court on a judgment obtained at a Supreme Court of the State of New York for the city and county of New York.

A copy of the record of the case in which said judgment was obtained is set out in the declaration in said action of debt.

The parties to said case are described in said record as "Henry Huston, plaintiff, against ——— Bowler (whose given name is unknown to plaintiff), Charles C. Herbert, and Charles Illius, defendants." The case was commenced early in June, 1869.

In the complaint, which was filed on or about the same day, and signed by the plaintiff's attorneys, it was charged that at all the times thereafter mentioned ——— Bowler (whose given name is unknown to plaintiff), Charles C. Herbert and Charles Illius, the defendants above named, were partners in business in the city of New York, under the firm name of Bowler, Herbert & Co.; that on the 17th day of November, 1864, certain persons, under their firm name of N. T. Carter & Co., made their draft or bill of exchange in writing, dated on that day and directed to the defendants, under their firm name of Bowler, Herbert & Co., and thereby required the said defendants, three months after the date thereof, to pay to the order of themselves the sum of \$1,624, and the said defendants afterward, to-wit: on the 22d day of November, 1864, for value received, accepted the said draft or bill; that thereafter, and before the maturity of said bill or draft, the plaintiff became, and then was, the lawful owner and holder for a valuable consideration; and that the defendants had not paid the same nor any part thereof, except the sum of \$1,000, but were justly indebted to the plaintiff in the sum of \$624, with interest thereon from the 20th day of February, 1865. Wherefore the plaintiff demanded judgment against the defendants for the said sum of \$624 and interest, besides the costs and disbursements of the suit, etc.

The summons to answer said complaint was returned with an affidavit of service thereof, on the 24th day of June, 1869, on Charles C. Herbert, one of the defendants. It does not appear to have been ever served on either of the other two defendants, or

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that the defendant Henry Bowler, the plaintiff in error, ever had any knowledge or information as to the existence of the case until after it had ceased to exist. But it does appear, as will presently be seen, that the defendant Charles Illius had knowledge of it soon after it was brought.

An answer was filed to said complaint in July, 1869, and was signed by "Sullivan & Bracken, defendants' attorneys, 29 Wall street, New York."

[Omitting a statement of its contents.]

Annexed to the said answer is an affidavit made by the said Charles Illius on the 17th day of July, 1869, stating that "he is one of the defendants above named, that he is acquainted with all the facts of the case, and that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true."

A copy of said answer was served on plaintiff's attorneys, who, it seems, gave "notice of settlement of order" to defendants' attorneys; but having made default on the same, it was dismissed by order of the court; whereupon the defendants' attorneys gave notice to the plaintiff's attorneys on the 30th of July, 1869, that the said answer was reserved.

No further order or other proceeding appears to have been made or taken in the case after the said 30th day of July, 1869, until the 28th day of January, 1874, when notice was given by the said plaintiff's attorneys to the said defendants' attorneys that the bill of costs indorsed in the notice would be presented to the clerk of the county of New York for adjustment, etc., at his office in the city of New York, on Friday, the 30th day of January, 1874, etc.; and on the same day due service of a copy of said bill of costs and notice of taxation of the same was admitted by the said attorneys for defendants.

On the 30th day of January, 1874, John P. Reed, Jr., one of the attorneys of the plaintiff in the case, made oath that on or about the 22d day of January, 1874, Charles Illius, one of the defendants, informed deponent that the full name of the defendant Bowler, was Henry Bowler, and on the same 30th day of January, 1874, on motion of the said Reed, Jr., it was ordered that the summons and complaint in the case be amended by inserting the name Henry before the word "Bowler," in the style of the case, and that the

words "whose given name is unknown," be stricken out. And on the same day the case was tried by the Supreme Court for the city and county of New York, and a jury, and the defendants not appearing, a verdict was rendered therein for the plaintiff for the sum of \$1,014.69, and his costs having been adjusted at \$210.73, on the motion of the attorneys for said plaintiff, it was adjudged that the plaintiff recover of said defendants the sum of \$1,014.69, found by the jury, with \$210.73 costs, together amounting to the sum of \$1,225.42.

On the 6th day of April, 1874, a little more than two months after the said judgment was obtained, an action of debt was brought thereon in the Circuit Court of the city of Richmond, as before mentioned, the parties to the action being described in the declaration therein as "Henry Huston, plaintiff," and "Henry Bowler, Charles C. Herbert and Charles Illius, late partners doing business in the city of New York, under the firm name of Bowler, Herbert & Co., defendants." The said Henry Bowler, who resided in the city of Richmond, was the only one of the said defendants who was summoned and appeared to the said action, the other two being non-residents of the State of Virginia.

On the 2d day of November, 1874, came the parties by their attorneys, and the defendant Henry Bowler pleaded *nil debet*, and put himself upon the country, and the plaintiff likewise (issues having previously been also joined upon the pleas of *nul tiel record* and the statute of limitations), and the said defendant then tendered to the court three special pleas in writing, to the filing of which the plaintiff objected, and the court rejected said special pleas and refusal to permit them to be filed (the same special pleas having also been tendered, objected to and rejected as aforesaid at previous terms of the said court); and neither party demanding a jury, and the evidence being heard, it was considered by the court that the plaintiff recover against the defendant Henry Bowler, \$1,225.42, with interest at the rate of seven *per centum per annum* on \$1,014.69, part thereof, from the 31st day of January, 1874, till paid, and his costs, etc.

To the opinion of the court rejecting the said special pleas, the defendant excepted, and the said pleas are set out in the bill of exceptions. They do not very materially vary from each other, and only one of them need to be set out here. The first is as follows:

[The plea stated in substance that the defendant was never served with process in the first action, and never appeared nor authorized any appearance, and had no knowledge of the action before judgment.]

An affidavit to the truth of the plea is annexed thereto.

The defendant applied to this court for a writ of error to said judgment, which was accordingly awarded. The main, if not the only error in the said judgment assigned in the petition for a writ of error, is the rejection of the said special pleas, which rejection is complained of for several reasons set forth in the petition.

Whether the said judgment be erroneous or not is the question which this court has now to decide.

This is an action of debt brought in this State on a judgment of another State, to-wit: New York.

By the Constitution of the United States, Article IV, section 1, it is declared that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The act of Congress of May 26, 1790, Vol. I, p. 115, after providing the mode by which they shall be authenticated, declares that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken."

For the judicial decisions which have been made in regard to the aforesaid provisions of the Constitution and the act of Congress, reference may be had to 2 Am. Lead. Cas. with notes by Hare & Wallace, 5th edition, pp. 597-664; the leading cases there reported being *Mills v. Duryee*, 7 Cr. 481-487, and *McElmoyle v. Cohen*, 13 Pet. 312-330.

In *Mills v. Duryee*, it was held that *nil debet* is not a good plea to an action founded on a judgment of another State; and such has been the uniform doctrine on the subject ever since.

As a necessary consequence, it has also ever since been uniformly held that *nul tiel record* is a good plea in such case.

In regard to the construction and effect of the provisions of the Constitution of the United States and the act of Congress afore-

said, it has been repeatedly held, and is firmly established by decisions of the Supreme Court of the United States, and of many, if not most of the several States, that the effect thus given in an action in one State upon a judgment obtained in another, is based upon the assumption that the court in which the judgment was obtained had jurisdiction of the case when it pronounced such judgment. It is not necessary, of course, that a defendant against whom a judgment is obtained should reside in the State in which the judgment is rendered, in order to give the court rendering the judgment jurisdiction of the case. It will have such jurisdiction, though the defendant be a non-resident of the State, if he be summoned therein, or appear in person, or by attorney, to the suit. But whether he reside therein or not, he must be so summoned, or appear, in order to give the court jurisdiction of the case, so as to give its judgment the effect in another State provided for by the Constitution and act of Congress aforesaid. And it is perfectly competent for a defendant in an action in one State, on a judgment rendered in another, to plead and show in his defense that he was not summoned and did not appear in person or by attorney in the suit in such other court; and that, too, even though it be expressly stated in the record of the suit in that court that he was actually summoned or did so appear. The judgment is not conclusive on either of those points, though it may be conclusive on the merits if the court have jurisdiction of the case.

That such has been the course of the decisions on this subject will appear by reference to the following, among others: *Bissell v. Briggs*, 9 Mass. 462 (1813); 6 Am. Dec. 88; *Starbuck v. Murray*, 5 Wend. 148 (1830); *Mervin v. Kumbel*, 23 id. 293 (1840); *Wilson v. Bank of Mt. Pleasant*, 6 Leigh (2d ed.), 570 (1835); *Gleason v. Dodd*, 4 Metc. 333 (1842); *Shelton v. Tiffin*, 6 How. 163 (1848); *D'Arcy v. Ketchum*, 11 id. 165 (1850); *Rape v. Heaton*, 9 Wis. 328 (1859); *Public Works v. Columbia College*, 17 Wall. 521 (1873); *Thompson v. Whitman*, 18 id. 457 (1873). In the last case, as in others, it was held that "the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist." *Knowles v. The Gaslight & Coke Co.*, 19 id. 58 (1873). In that case it was held that, "in an action on a judgment in another State, the defendants, notwithstanding the record

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shows a return of the sheriff that he was personally served with process, may show the contrary, namely, that he was not served, and that the court never acquired jurisdiction of his person." And the case of *Thompson v. Whitman*, *supra*, decided by the same court in the same year, was affirmed and applied. *Hill v. Mendenhall*, 21 id. 453 (1874). In that case it was held by Chief Justice WAITE, delivering the opinion of the whole court, that "since the cases of *Thompson v. Whitman*, 18 Wall. 457, and *Knowles v. Gaslight & Coke Co.*, 19 id. 58, it may be considered as settled in this court, that when a judgment rendered in one State is sued upon in another, the defendant may contradict the record to the extent of showing that in point of fact the court rendering the judgment did not have jurisdiction of his person. If such showing is made, the action must fail, because a judgment obtained under such circumstances has no effect outside of the state in which it was rendered. In *Underwood v. McVeigh*, 23 Gratt. 409, Judge CHRISTIAN, delivering the unanimous opinion of this court, laid down the principle among others of a like kind, that "no sentence of any court is entitled to the least respect in any other court or elsewhere when it has been pronounced *ex parte* and without opportunity of defense." To the same effect is *Windsor v. McVeigh*, 3 Otto, 274. See also the following books on the same subject, viz.: 1 Kent's Com. (11th ed.) 261, marg., and notes; 1 Rob. Pr. 219; 6 id. 437; 7 id. 109; 1 Smith's Lead. Cas. (7th Am. ed.) 1118-1146; 2 id. 828; 3 Am. Lead. Cas., *supra*.

The summons to answer the complaint in the action of debt in New York appears from the record to have been executed on one only of the three defendants, to-wit: Charles C. Herbert; though another of them, to-wit: Charles Illius, had notice and joined in the defense of the action, and made oath to the truth of the facts stated in the answer. The third defendant, Henry Bowler, appears never to have been summoned to answer the complaint, nor to have appeared to defend the action, in person or by attorney, nor to have authorized any attorney to appear for him for that purpose, nor to have had "at any time before the recovery of judgment in said action any notice or knowledge of any process or summons, or of any proceeding in said action, or any means or opportunity of defending himself therein or therefrom," as he avers in his special pleas which he offered, but which were rejected in the action brought in this State on the said judgment as aforesaid. The said Henry

Bowler no doubt resided in the city of New York when the contract was made, to wit: in November, 1864, and probably, also, when the said action was brought thereon in New York in June, 1869. If he did not then reside in the city, he no doubt resided elsewhere in the State of New York, as he does not aver in his said special pleas that he was then a non-resident of the State of New York. His Christian name was then unknown to the plaintiffs or their attorneys in the said action, and continued to be unknown to them until about the 22d day of January, 1874, a few days before the judgment in the said action was rendered, when it was ascertained by one of the said attorneys; and a few days thereafter, and, indeed, on the very day on which the judgment was rendered, to-wit: the 30th day of January, 1874, it was inserted, for the first time, in the blank which had been left for it in the proceedings in said action. The said Henry Bowler ceased to be a resident of the city and State of New York, but at what time does not appear, though probably after the said action there was brought, but no doubt before the judgment was rendered therein. When the action was brought in the Circuit Court of the city of Richmond on the said judgment he resided in the said city, but how long he had previously resided therein does not appear, nor is the fact material.

It was insisted by the counsel for the defendants in error in their argument of this case, that it appears from the record of the action in New York that the defendants appeared in that action by their attorneys, which means that all of the defendants so appeared; and that any or either of the defendants had a right to employ attorneys to appear for all in the action, even though the partnership may have been, as it no doubt was, previously dissolved; the said counsel contending that a partnership, though actually dissolved for all purposes of carrying on the business of the partnership, is considered as continuing until all its business is settled and ended.

In regard to what the record shows as to the appearance of the defendants by their attorneys, it was insisted by the counsel for the plaintiff in error that the word "defendants" here means only the two defendants, Herbert and Illius, who were actually before the court. But even if it was intended to embrace the third defendant also, Bowler, we have seen that it was still competent for that defendant to traverse the fact that any attorney was employed in the case by him or on his authority.

In regard to the authority of any of the members of a dissolved

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partnership to retain an attorney to defend the other members of the late firm in an action brought against them, it seems to be now well settled that no such authority exists, unless specially given. It does not result from the partnership itself.

This was held in a very recent case, decided in 1875 by the Supreme Court of the United States, *Hall v. Lanning*, 1 Otto, 160. There it was held that a member of a partnership residing in one State, not served with protest and not appearing, is not personally bound by a judgment recovered in another State against all the parties after a dissolution of the firm, although the other members were served, or did appear and cause an appearance to be entered for all, and although the law of the State where the suit was brought authorized such judgment; and that after the dissolution of a partnership one partner has no implied authority to cause the appearance of another partner to be entered to a suit brought against the firm. And a *quære* is added by the reporter to his caption of the report of said case: Whether such implied authority exists during the continuance of the partnership? But it is unnecessary to decide that question in this case.

It is obvious, and indeed seems to have been admitted by the counsel on both sides in their argument of this case, that the action in New York was under section 136 (as amended in 1866) of the Code of Procedure of that State, page 101, which, so far as it relates to this case, is as follows: "Where the action is against two or more defendants, and the summons is served on one or more of them, but not on all of them, the plaintiff may proceed as follows: 1. If the action be against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served," etc.

Supposing the proceeding to be had and the judgment to have been obtained in New York under the section aforesaid, it is obvious that the judgment can have effect only in the State of New York, and against the joint property of all the defendants and the separate property of such of them only as were served with process there, and against the persons of the latter if they were subject to arrest; and that it cannot have any effect *extra territoriam*. And

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at all events, that it cannot have the effect of a judicial proceeding of one State on which judgment may be recovered in another, under the provision of the Constitution of the United States and act of Congress aforesaid, against a defendant who was not served with process in such judicial proceeding, and did not appear therein, in person or by attorney. The only purpose of an action in another State on such a judgment is to obtain a personal judgment against the defendant residing or who may happen to be therein, and who was not served with process and did not appear to the first action. The judgment in that action is no evidence against him in an action brought thereon in another State. In its very nature it is confined in its operation to the State in which it was obtained and by which it was authorized. It was not, and could not have been, authorized with a view to another State, or to the provision of the Constitution and act of Congress aforesaid. At all events it can have no greater effect than would a judgment of a foreign State in an action brought thereon in this State.

The proceedings in this case illustrate the wisdom of confining the operation of a judgment obtained under the aforesaid section of the New York Code of Procedure to the jurisdiction in which it is obtained, and not extending it to other States under the provision of the Constitution and act of Congress aforesaid, and show that the greatest injustice might otherwise be done.

[Omitting these considerations.]

Judgment reversed and cause remanded.

MARTIN'S EXECUTRIX V. LEWIS' EXECUTOR.

(30 Gratt. 672.)

Evidence — parol, to attach condition to bill of exchange.

L., being indebted to the firm of J. M. S. & Co., gave to M., who acted for the firm, a draft for the amount on O., who was indebted to L. O. accepted the draft but it was not paid. In an action on behalf of J. M. S. & Co. against L. on the draft, *held*, that parol evidence was not admissible to show that M. agreed, at the time of the giving of the draft, that if it was accepted it should be a discharge of all liability of L. on the debt or on the draft.*

* To same effect, *Crawford v. Clifford* (44 Wis. 569), 28 Am. Rep. 608.

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SUIT on a bill of exchange. The opinion states the facts. The bill was dismissed below.

Sheffey & Bumgardner, for appellant.

Wm. J. Robertson, for appellee.

CHRISTIAN, J. This case is before us on appeal from a decree of the Circuit Court of Albemarle county. The foundation of the suit is a paper writing in the following words and figures, to wit :

“ \$1,805.76.

“ SCOTTSVILLE, Aug. 20, 1866.

“ On the 1st January, 1867, pay to Messrs. Mason, Martin & Co., eighteen hundred and five 76-100 dollars for value received, it being in full for the account of Daniel P. Lewis.

(Signed)

“ GEO. C. GILMER,

“ *Agent for DAN. P. LEWIS.*”

Addressed “ To Jno. O. Lewis, Scottsville.”

This paper is indorsed across the face thereof:

“ Accepted.”

(Signed)

“ JNO. O. LEWIS.”

On the 4th day of January, 1867, this writing was duly protested for non-payment by the acceptor, and notice of protest sent to George C. Gilmer, agent for Daniel P. Lewis, addressed to his proper post-office at Charlottesville.

In the year 1869 (Daniel P. Lewis having in the mean time departed this life), an action at law was instituted against Daniel P. Lewis' executor, on this writing, but upon demurrer was dismissed without prejudice to the right of any party interested to resort to a court of equity.

The present suit was brought by the executor of John S. Martin, who was a member of the late firm of Mason, Martin & Co., for the purpose of asserting the claim of the parties interested in said firm, to the sum of money due from the estate of Daniel P. Lewis, who it is claimed was responsible to said firm as drawer of the order or draft above referred to, and which was protested for non-payment by the acceptor.

The bill was dismissed by the Circuit Court, as to the executor of Daniel P. Lewis; and from this decree the plaintiff obtained an appeal from one of the judges of this court.

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It does not appear in the decree of the Circuit Court upon what ground the plaintiff's bill was dismissed. The defendant both demurred and answered, and much evidence was taken in the cause; that of the defendant being taken for the purpose of showing that there was a parol agreement at the time the paper writing was executed; that the firm of which the acceptor, John O. Lewis, was a member, would receive the order of Daniel P. Lewis, when accepted by the former, in payment of the debt of \$1,805.76 due to the firm by the latter, and that he, Daniel P. Lewis, was not to be held in any way responsible for said debt, whether John O. Lewis, the acceptor, paid it or not.

It does not, however, appear from the record whether the case was considered by the Circuit Court upon its merits and dismissed for want of equity in the bill, or whether it was dismissed upon the demurrer for want of jurisdiction. But it was argued at the bar here that the bill was properly dismissed, because the plaintiff had full, complete and adequate remedy at law. I cannot give my assent to this view. I think the case was plainly one for adjudication by a court of equity.

[Omitting the discussion of this point.]

We come now to the main and important questions in the cause. First, what is the nature and legal effect of the paper writing above referred to? and second, can the parol agreement alleged to have been made (if proved as alleged) at the time of the execution of that paper, vary or in anywise affect the legal rights and obligations which grow out of and are fixed by law in the terms of the written paper?

It must be conceded that the paper before us is a *bill of exchange*. It comes within the very terms of the definition of a bill of exchange. It is an unconditional written order or request addressed by one person to another, desiring him to pay a certain sum of money to a certain person or persons.

Of this bill of exchange Daniel P. Lewis (through his agent Gilmer) is the drawer, Mason, Martin & Co. are the payees, and John O. Lewis is the acceptor. It has all the constituent elements of a bill of exchange,* and was treated as such by the holders and payees. It was presented for acceptance, and was duly accepted. It was presented for payment, and upon non-payment was duly protested, and notice of protest given to the drawer. The legal rights and

*See *Corbett v. Clark*, 30 Am. Rep. 763.

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liabilities attaching to such a paper are definitely fixed by law. It was the right of the payees to present it for acceptance and payment, and upon non-acceptance or non-payment to have the bill protested and look to the drawer for payment. It was the undertaking and obligation of the drawer, if the bill was not accepted and paid by the acceptor, to make it good, upon due notice, to the payees. The legal import of the paper, by its very terms, was to fix these rights and liabilities upon the parties to this written contract. Now it is proposed, as matter of defense in a court of equity, by the executor of the drawer of this bill, that although the sum of money for which the bill was drawn was justly due and never paid, and although the bill was duly presented to the acceptor and protested for non-payment, of which due notice was given, there is no liability fixed on the drawer because of a contemporaneous parol agreement, which totally varies the terms and legal effect of the written instrument.

This parol agreement, it is attempted to show by the evidence of the defendant's witnesses, Duke, and Gilmer, the agent of Daniel P. Lewis, the drawer of the bill of exchange, and who signed said bill, and who is the executor of Daniel P. Lewis. I extract from the record Gilmer's evidence, which was at the time excepted to, and which is as follows : He says :

"Soon after the surrender of General Lee, Mr. John S. Martin, of the firm of Mason, Martin & Co., came to my house to see myself and Mr. Daniel P. Lewis about the settlement of our accounts with the said firm, and proposed to take my individual note for the amount, I think upon five years' time, which, owing to the condition of the country, I positively refused, but proposed to settle those old accounts out of any debts due Mr. Daniel P. Lewis, provided that settlement was final so far as Mr. Lewis and myself were concerned, and he might select from the debts due Mr. Lewis, and I would give an accepted order for the full amount, which would relieve Mr. Lewis and myself from any further obligations, as I was unwilling to renew old debts with any new obligations then. He looked over the accounts and selected Mr. John O. Lewis'; I agreed to give it as soon as he would get Mr. John O. Lewis to agree to accept ; for some year or more, I won't be positive, I think it was, he got Mr. John O. Lewis to agree to accept it ; I at once wrote to Mr. John O. Lewis to know if he agreed to accept it, and he wrote he did ; I then got Mr. William J. Duke, to go with me down to

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settle with Mr. Martin ; they took the papers, made settlement, I not being present ; Mr. William Duke then called me to them, saying they had made the settlement, and Mr. John S. Martin then handed me the paper which he had drawn for me to sign, which I thought might hold Mr. Lewis or myself responsible, and I refused to sign it ; that I would sign no paper that would hold myself or Mr. Lewis responsible, was our agreement ; he then asked Mr. Duke to draw such a paper as would suit our agreement, and not hold Mr. Lewis or myself responsible ; I then signed the paper which Mr. Duke drew, and took it to Mr. John O. Lewis, who accepted and then gave it to Mr. Martin, who took it and expressed himself as fully satisfied with it, and saying that we were no further bound for it."

This testimony of Gilmer is confirmed substantially, if not literally, by the witness Duke.

[Omitting some remarks.]

Is such evidence of a contemporaneous parol agreement admissible to contradict or vary that which is contained in a written instrument? The parol agreement attempted to be set up in this case wholly contradicts and totally varies the terms, legal import and effect of the writing between the parties. In the one the drawer binds himself to pay in the event that the acceptor does not pay. By the terms of the parol agreement as proved, neither the drawer nor his agent was to be held responsible in any event.

I think it is clear that such evidence is wholly inadmissible. The general principle that evidence of a contemporaneous parol agreement is not admissible to vary or contradict a written instrument is too familiar and well established to require any citation of authority. It is a principle which has now become one of the axioms of jurisprudence, and is of the last importance in the administration of justice. Without this general principle there would be no certainty in written agreements, and no security in the most formal contracts and the most specific transactions among men. It ought not to be weakened or frittered away by nice distinctions and ingenious exceptions, to meet hardships, real or supposed, of particular cases. Where the parties have reduced their agreement to writing, that agreement cannot be overthrown by evidence of a parol agreement proved by interested witnesses, or dependent for its establishment upon the slippery memory of men; especially cannot it be done as in this case it is attempted to be done,

by the statement of parties to *one* side of a transaction, when the lips of the other party to that same transaction are sealed in death.

Now, the rule of exclusion of a parol agreement, above stated, applies as well to a written instrument, whose *legal import* is clear and definite (as to the rights and liabilities of the parties thereto), as to one where specific stipulations are fully written out. Between such instruments, distinctions which the courts have sometimes attempted to make are not based on any just ground in principle. As was well said by Judge JOYNES, in his able and exhaustive opinion in the case of *Woodward v. Foster*, 18 Gratt. 200, 205: "When the legal import of a contract is clear and definite, the intention of the parties is, for all substantial purposes, as distinctly and as fully expressed as if they had written out in words what the law implies. It is immaterial how little or how much is expressed in words if the law attaches to what is expressed a clear and definite import. Though the writing consists of only a signature, as in the case of an indorsement in blank, yet where the law attaches to it a clear, unequivocal and definite import, the contract imported by it can no more be varied or contradicted by evidence of a contemporaneous parol agreement than if the whole contract had been wholly written out in words. The mischiefs of admitting parol evidence would be the same in such cases as if the terms implied by law had been expressed."

This rule, while applicable to all cases of written instruments, applies especially to mercantile instruments. In *Bank of United States v. Dunn*, 6 Pet. 51, Mr. Justice MCLEAN, delivering the opinion of the court, said: "The liability of a party to a bill of exchange or promissory note has been fixed on certain principles which are essential to the credit and circulation of such paper. These principles originated in the convenience of commercial transactions, and cannot now be departed from."

The principles thus stated have been recognized by the whole current of authorities, English and American. Only one case is cited by the learned counsel for the appellee in support of the proposition that the parol agreement, as stated by Gilmer, can be set up against a written paper, and relied on by him as a case exactly in point, and that is the case of *Pike v. Street*, reported in 1 Mood. & Malk. 226; s. c., 22 Eng. C. L. 299. It is sufficient to remark that the authority of that case is to a certain extent questioned in *Foster v. Jolly*, 1 Crompt. Mees. & Ros. 703, and seriously

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questioned by Judge JOYNES in *Woodward v. Foster*, *supra*, and is reported by Mr. Bigelow in his volume of Overruled Cases. Whether expressly overruled or not, it is contrary to the unbroken current of authority both in England and in this country. See cases cited by Judge JOYNES in case cited, *supra*; also, *Brown v. Wiley*, 20 How. 442; *Specht v. Howard*, 16 Wall. 564; *Forsythe v. Kimbal*, 1 Otto, 291; *Brown v. Spofford*, 5 id. 474; *Cassidy v. Metcalf*, 66 Mo. 519.

The appellee, however, in avoidance of this general rule, now so universally recognized by the courts, seeks to shelter himself under that exception to the general rule which confers upon courts of equity the power to reform or rescind a written contract made under a *mistake*.

In this case, if there was any mistake shown, it was a *mistake of law*, and not of fact. I think it may be affirmed, upon the authorities, that mistakes of law, unless accompanied with fraud, misrepresentation, concealment, surprise or some similar peculiarity of circumstances, furnish no ground of equity jurisdiction. The elementary maxim *ignorantia legis neminem excusat* prevails in the administration of civil as well as criminal law, and is as potent in a court of chancery as in a common-law court. I do not deem it necessary here to enter upon any elaborate discussion of the distinctions made by the courts between mistakes of fact and mistakes of law; nor to undertake the difficult, if not impossible, task of reconciling the numerous adjudged cases on this subject. It is sufficient to refer to the opinion of Judge STAPLES in *Zollman v. Moore*, 21 Gratt. 313, the able review of this doctrine, and many adjudged cases by Judge STORY, in the fifth chapter of his work on Equity Jurisprudence, and the notes to the leading case of *Woollam v. Hearn*, reported in White & Tudor's Leading Cases in Equity, pp. 920, 980, *et seq.*, where all the cases are collected, and to deduce from them the principles which must govern courts of chancery in the exercise of their powers in this branch of equity jurisprudence.

From this review of the authorities, it may be at least safely affirmed that the province of courts of chancery to correct *mistakes of law* is rarely exercised, and will not be exercised, unless the mistake is established beyond all reasonable doubt. The burden of proof is always on the party setting up the parol agreement, who must rebut the presumption that the writing speaks the final agreement, by the clearest and most satisfactory evidence. As was well

said by BLACK, C. J., in *Light v. Light*, 9 Harr. 407: "If contracts were binding only on those who knew what construction the courts would put upon them, very few would stand. No system of jurisprudence could be administered for a year on this principle without falling to pieces. All codes have therefore adopted the maxim *ignorantia legis neminem excusat*. It is therefore a general, though not invincible rule, that in the absence of fraud and undue influence, one who executes an instrument with an opportunity of knowing what it contains, cannot rely on an alleged misapprehension of its legal effect as a ground of equitable relief."

In the notes to the leading case of *Woollam v. Hearn*, 2 Lead. Cases in Equity, *supra*, the learned annotators, after a most elaborate review of the numerous adjudged cases on this question, declare that "the reformation of a writing on the ground of a mistake in law is a transcendent exercise of judicial power requiring the utmost care and deliberation. The party asks that he may not be bound by words which he has made his own, by putting his hand to the instrument. He must, therefore, show how he came to adopt language which did not express his meaning. As between two parties, one of whom maintains that a writing which they executed conveys their intention, while the other contends that it does not, the burden of proof is obviously on the latter. The explanation should be so reasonable, probable and natural, as to satisfy the mind of the existence of the mistake, and that it can be rectified without injustice. It has been truly said that one who alleges that he understood that a note payable on demand, or in a year from date, was to be renewed indefinitely, or delivered up unpaid at the death of the promisee, ought not to be believed on any amount of testimony.

"Courts of equity do not sit for the protection of men, who, having the full possession of their faculties, deliberately express themselves in language which does not convey their meaning."

In a very recent case decided last year by the Supreme Court of the United States, and reported in 5 Otto, 480, *Brown v. Spofford*, and which is a case exactly in point, Mr. Justice CLIFFORD, speaking for the whole court, said: "Where a bill of exchange was drawn in the usual form and was protested for non-payment, the court held twenty years ago that parol evidence of an understanding between the drawer and the party in whose favor the bill was drawn was inadmissible to vary the terms of the instrument. * * * Cer-

tain fixed principles govern the liability of parties to a bill of exchange or promissory note, which are essential to the credit and circulation of such paper. * * * Decided cases of the most authoritative character have determined that parol evidence of an oral agreement alleged to have been made at the time of drawing, making or indorsement of a bill or note, cannot be admitted to vary, qualify, contradict, or add to or subtract from the absolute terms of the written contract."

Upon principle and authority, therefore, I am clearly of opinion that the evidence appearing in the record, tending to prove the alleged parol agreement in this case, is plainly inadmissible, that it ought to have been discarded by the court, and the estate of Daniel P. Lewis, the drawer, ought to have been held liable for the sum of money for which the bill of exchange was drawn by him.

[Omitting a minor point.]

Upon the whole, I am of opinion that the decree of the Circuit Court dismissing the plaintiff's bill was erroneous, and must be reversed.

Decree reversed.

MONCURE, P., and BURKS, J., concurred in the opinion of CHRISTIAN, J.

KINNEY V. COMMONWEALTH.

(80 Gratt. 858.)

Criminal law — prohibited marriage legally contracted in another State.

K., a negro man, and M., a white woman, domiciled in Virginia, went to the District of Columbia and were there legally and regularly married, and after remaining there ten days returned to their home in Virginia and continued to reside there as husband and wife. The law of Virginia prohibits marriages between white persons and negroes. *Held*, that the parties were liable to indictment in Virginia for lewd and lascivious cohabitation.*

CONVICTION of lewd cohabitation. The opinion states the facts.

J. M. Quarles, for appellant.

Attorney-General, for the Commonwealth.

*See *State v. Bell*, ante, 549.

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CHRISTIAN, J. The plaintiff in error was indicted in the county court of Augusta county for lewdly associating and cohabiting with Mahala Miller. He was found guilty and a fine assessed against him to the amount of \$500. The case was taken up on writ of error to the Circuit Court, which affirmed the judgment of the county court, and to this latter judgment of the Circuit Court a writ of error was awarded by one of the judges of this court. The bill of exceptions taken on the trial in the county court, which brings up before this court the only question we have to determine, is in these words :

“ Be it remembered, that on the trial of the indictment in this case, the Commonwealth, to sustain the issue on her part, proved to the jury that the defendant, Andrew Kinney, and a certain Mahala Miller, on the 1st day of January, 1877, and from that time to the 27th day of August, 1877, in the county of Augusta and State of Virginia, did live and associate together as man and wife ; that said Andrew Kinney is a negro, and said Mahala Miller a white woman, and that in November, 1874, they, as citizens of the State of Virginia, regularly domiciled in the county of Augusta, left their own State for the purpose of being married in the District of Columbia, and in ten days thereafter returned to this State to live, and have since lived together as man and wife in said county of Augusta.”

The defendant, to sustain the issue on his part, proved that he and the said Mahala Miller were married in the District of Columbia on the 4th day of November, 1874, in accordance with the laws of said district.

Whereupon the counsel for the defendant moved the court to instruct the jury as follows, that is to say : that under the circumstances proven, the marriage of Andrew Kinney and Mahala Miller in the District of Columbia, on the 4th day of November, 1874, is valid and a bar to this prosecution, and that they must find a verdict of acquittal. But the court refused to give the said instruction to the jury, and instructed the jury as follows : “ That the said marriage of the defendant and said Mahala Miller was, under the circumstances proven, but a vain and futile attempt to evade the laws of Virginia, and override her well-known public policy, and is therefore no bar to this prosecution ; to which opinion and action of the court, in refusing the said instruction asked for by the counsel for the defendant, and in giving the said instruc-

tion given by the court, the defendant, by his counsel, excepts and tenders this his bill of exceptions, which he prays may be signed, sealed and made a part of the record in this case."

The sole question submitted by this bill of exceptions for the adjudication of this court is, whether the alleged marriage celebrated in the District of Columbia, "in accordance with the laws of said district," as certified in the certificate of facts, is a bar to this prosecution? It is conceded that a marriage in this State between a white person and a negro is void. It is not only prohibited by the statute law, but penalties are imposed for its violation. The first section of chapter 105, Code 1873, provides that "all marriages between a white person and a negro, and all marriages which are prohibited by law on account of either of the parties having a former wife or husband then living, shall be absolutely void without any decree of divorce or other legal process." In the same section other marriages prohibited by law therein mentioned are voidable only — that is, declared to be void only from the time they shall be so declared by decree of divorce or nullity. These are cases of marriages within the prohibited degrees of consanguinity or affinity, or where either party was insane or incapable from physical causes. Such marriages are void when declared to be void by decree of divorce or nullity, or when the parties are convicted under the third section of chapter 192, which denounces certain penalties against marriages of parties within the prescribed degrees of consanguinity or affinity. But marriage between a white person and a negro is declared by statute to be absolutely void without any decree of divorce or other legal process. If, therefore, the marriage had been celebrated in this State between Andrew Kinney, who is a negro, and Mahala Miller, who is a white woman, no matter by what ceremonies or solemnities, such marriage would have been the merest nullity, and the parties must have been regarded, under our laws, as lewdly associating and cohabiting together, and obnoxious to the penalties denounced by our statute against this gross offense.

Does the marriage of the parties in the District of Columbia, where marriages between white persons and negroes are not prohibited, present a bar to this prosecution and put the parties on any different footing when arraigned before our tribunals for a violation of the laws of this State? It is admitted that Andrew Kinney and Mahala Miller had their domicile in Augusta county, in this State; that they remained out of the State only ten days after their mar-

riage, and returned here, and that this county is still their domicile.

It is plain to be gathered from the whole record, if not indeed admitted, that these parties, knowing they could enter into no valid marriage contract in this State, went to the city of Washington for the purpose of evading the statute law of this State; were there married, and in a few days returned to this State. They never changed nor designed to change their domicile. It was here then; it is here now.

The important question, and one of first impression in this State is: Does the marriage in the District of Columbia, made *in fraudem legis* of this State, protect the parties in a prosecution in this State for a violation of its penal laws in this most important and vital branch of criminal jurisprudence, affecting the moral well being and social order of this State? Must the *lex loci contractus* or the *lex domicilii* prevail?

There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects; to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying. The right to regulate the institution of marriage; to classify the parties and persons who may lawfully marry; to dissolve the relation by divorce; and to impose such restraints upon the relation as the laws of God, and the laws of propriety, morality and social order demand, has been exercised by all civilized governments in all ages of the world.

It is insisted, however, by the learned counsel for the plaintiff in error, in the ingenious and able argument which he addressed to this court, that conceding the power of every State and country to pass such laws, yet they never act *extra territoriam*, but must be confined, with rare exceptions, to such marriages as are contracted and consummated within the State where they are prohibited. He invokes for his client in this case the rule laid down by jurists and text-writers, that "a marriage valid where celebrated is good everywhere."

This is undoubtedly the general rule. But there are certain exceptions to this general rule, and while in its application and the affirmance of certain exceptions thereto, there was for a long time much confusion in the authorities and conflict in the cases, I think it may now be affirmed that there are exceptions to this general rule as well established and authoritatively settled as the rule itself.

Mr. Justice STORY, in his valuable work on the Conflict of Laws, § 113, probably lays down the general rule contended for more strongly than any other modern author. He says: "The general principle certainly is, that between persons *sui juris* marriage is to be decided by the law of the place where celebrated. If valid there it is valid everywhere. It has a legal ubiquity of obligation. If invalid there it is equally invalid everywhere." But he immediately adds in the following section (113a): "The most prominent, if not the only known exceptions to the rule are those marriages involving polygamy and incest, *those positively prohibited by the public law of a country from motives of policy*, and those celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the laws of their own country."

In the comparatively recent case of *Brook v. Brook*, 9 H. L. C. 193 (marg.), 145 (bottom), I find the most elaborate, learned and satisfactory discussion of this general rule on the subject of marriage, with the exceptions thereto, that I have seen in any of the numerous cases on the subject. The facts of that case and the principles therein declared are singularly apposite to the case in hand.

The act of 5 and 6 William 4, ch. 54, enacts that all marriages which should thereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity, "shall be absolutely null and void to all intents and purposes whatsoever." The marriage of a man with his wife's sister is included in this prohibition.

William Leigh Brook, after the death of his first wife, intermarried with Mrs. Emily Armitage, the lawful sister of his former wife. The marriage was celebrated at a Lutheran church at Wansbeck, near Altona, in Denmark. At the time of the Danish marriage both Mr. Brook and Mrs. Armitage were lawfully domiciled in England, and had merely gone over to Denmark on a temporary visit. According to the laws of Denmark, where the marriage was celebrated, it was not unlawful for a man to marry his wife's sister. In a suit among the heirs of Brook, Vice Chancellor STUART, with whom sat Mr. Justice CRESSWELL, were of opinion, and so declared, that the marriage in Denmark was, by the laws of England, invalid. The case was carried up to the House of Lords. It was there considered with that great deliberation and carefulness characteristic of that great tribunal. Opinions were delivered

by the lord chancellor (Lord CAMPBELL), Lord CRANWORTH, Lord ST. LEONARDS and Lord WENSLEYDALE. After reviewing a number of English and some American cases, the lord chancellor said: "They (the appellants) rest their case entirely upon the fact that the marriage was celebrated in a foreign country, where the marriage of a man with the sister of his deceased wife is permitted." There can be no doubt of the general rule that a foreign marriage, valid according to the law of a country where it is celebrated, is valid everywhere. But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which, the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such in essentials as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated. This qualification upon the general rule "that a marriage valid where celebrated is good everywhere," he adds, is to be found in the writings of many eminent jurists who have discussed the subject, among whom he mentions HUBERUS and STORY.

Lord CRANWORTH states that the marriage referred to in the general rule is not a marriage prohibited by the laws of the country to which the parties contracting matrimony belong. The other lords, as well as Lord CRANWORTH, concur fully in the opinion of the lord chancellor.

Whatever conflict of authority there may have been on this subject, it may now be affirmed, since the decision of *Brook v. Brook*, that in England, a marriage prohibited by law in that country, between parties domiciled there, and declared by act of Parliament to be absolutely void, is invalid there no matter where celebrated. In this country the same doctrine is affirmed in North Carolina, Louisiana and Tennessee. See *Williams v. Oates, Ex'r*, 5 Ired. 535; *State v. Kennedy*, 76 N. C. 251; s. c., 22 Am. Rep. 683; *State v. Ross*, 77 N. C. 242; s. c., 22 Am. Rep. 678; *Dupre v. Boulad's Ex'r*, 10 La. Ann. 411.

Whenever the question has arisen in the southern States, it has been held that a marriage between a white person and a negro, although the marriage be celebrated in a State where such marriages are not prohibited, is void in the State of the domicile, and when they go to another State temporarily, and for the purpose of evading the law, and return to their domicile, such marriage is no bar to a criminal prosecution. And such is the law of this State. It is now so declared by statute. See Sess. Acts of 1877-8. The statute, however, was passed after the marriage of the parties in this case. But without such statute, the marriage was a nullity. It was a marriage prohibited and declared "absolutely void." It was contrary to the declared public law, founded upon motives of public policy—a public policy affirmed for more than a century; and one upon which social order, public morality, and the best interests of both races depend. This unmistakable policy of the legislature, founded, I think, on wisdom and the moral development of both races, has been shown by not only declaring marriages between whites and negroes absolutely void, but by prohibiting and punishing such unnatural alliances with severe penalties. The laws enacted to further and uphold this declared policy would be futile and a dead letter if in fraud of these salutary enactments, both races might, by stepping across an imaginary line, bid defiance to the law, by immediately returning and insisting that the marriage celebrated in another State or country should be recognized as lawful, though denounced by the public law of the domicile as unlawful and absolutely void. No State will permit its citizens to violate its laws by such evasions. But the law of the domicile will govern in such case, and when they return, they will be subject to all its penalties, as if such marriage had been celebrated within the State whose public law they have set at defiance.

There is one American case which is directly opposed to the principles herein declared, the facts of which are precisely the same as in the case before us. It is the case of *Medway v. Needham*, 16 Mass. 157, which was strongly relied on by the learned counsel for the plaintiff in error as authority to govern this case. But I think that case is not supported by authority nor grounded on any sound principles of law. That was the case of a marriage between a white person and a negro. The parties were domiciled in Massachusetts, whose laws at that time prohibited such marriages. They went into Rhode Island, where such marriages were lawful, were

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there married, and returned to Massachusetts. The Supreme Court of that State held the marriage to be valid, and declared, in an elaborate opinion, that "a marriage which is good by the laws of the country where it is celebrated, is valid in every other country; and although it should appear that the parties went into another State to contract such marriage, with a view to evade the laws of their own country, the marriage in the foreign country will nevertheless be valid in the country in which the parties live."

In commenting on this case, the lord chancellor, in *Brook v. Brook, supra* (219), says: "I cannot think it is entitled to much weight, for the learned judge admitted that he was overruling the doctrine of *Huberus* and other eminent jurists; he relied on decisions in which the forms only of celebrating the marriage in the country of celebration and the country of domicile were different; and he took the distinction between cases where the absolute prohibition of marriage is forbidden on motives of policy, and where the marriage is prohibited as being contrary to religion on the ground of incest. I myself must deny the distinction. If a marriage is absolutely prohibited in any country as being contrary to public policy and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another State in which the marriage is not prohibited, to celebrate a marriage forbidden by their own State, and immediately returning to their own State, to insist on their marriage being recognized as lawful.

Lord CRANWORTH, referring to the same case, said: "I also concur entirely with my noble and learned friend that the American decision of *Medway v. Needham* cannot be treated as proceeding on sound principles of law.

"The province or State of Massachusetts positively prohibited by its laws, as contrary to public policy, the marriage of a mulatto with a white woman; and on one of the grounds, pointed out by Mr. Story, such a marriage ought certainly to have been held void in Massachusetts, though celebrated in another province where such marriages were lawful."

With such condemnation, from so high a source, of this decision as authority, and when it is opposed by the decisions of our sister southern States above referred to, and contrary to sound principles of law, I think, though a case exactly in point upon its facts, it can

have but little weight in forming our judicial determination of the question before us in this case.

There is another American case also relied on by the counsel for the plaintiff in error for the doctrine that "a marriage valid where celebrated is valid everywhere." It is a Kentucky case — *Stevenson v. Gray*, 17 B. Monr. 193. That was a marriage between a nephew and his uncle's wife. Such a marriage was prohibited in Kentucky, but not in Tennessee. The parties went into Tennessee, and were there married and returned to Kentucky. It was held that the marriage was valid in Kentucky. But it is to be noted that such marriages are not declared by the Kentucky statute *absolutely void*, but voidable only — that is, to be avoided by judgment of a District Court or Court of Quarterly Sessions. The reasoning of the judge who delivered the opinion of the court in that case, shows that he treats the case of a marriage *voidable* only, and not *ipso facto void*. If such marriage had been declared absolutely void by the Kentucky statute, the decision of the court, no doubt, would have been different.

In the seventh edition of Story's Conflict of Laws, p. 178, the editor adds a section in which he says : The limitation defined by Lord CAMPBELL, chancellor, in *Brook v. Brook*, is certainly characterized by great moderation and good sense ; that while the form of the contract, the rites and ceremonies proper or indispensable for its due celebration, are to be governed by the laws of the place of the contract or of celebration, *the essentials* of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Hence, if the incapacity of the parties is such that *no marriage could be solemnized between them* * * * and, without changing their domicile, they go into some other country where no such limitation or restriction exists, and there enter into the formal relation with a view to return and dwell in the country in which such marriage is prohibited by positive law, it is but proper to say that a proper self-respect (of the State or government in prohibiting such a marriage) would seem to require that the attempted evasion would not be allowed to prevail.

I have thus considered, at length, the authorities, English and American, on this question, because it is one of first impression in this court, and because it is a question which materially affects public morality, social order, and the best interests of both races.

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The public policy of this State, in preventing the intercommingling of the races by refusing to legitimate marriages between them has been illustrated by its legislatures for more than a century. Every well-organized society is essentially interested in the existence and harmony and decorum of all its social relations. Marriage, the most elementary and useful of all, must be regulated and controlled by the sovereign power of the State. The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent—all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.

Upon the whole case, I am of opinion that the marriage celebrated in the District of Columbia between Andrew Kinney and Mahala Miller, though lawful there, being positively prohibited and declared void by the statutes of this State, is invalid here, and that said marriage was a mere evasion of the laws of this State, and cannot be pleaded in bar of a criminal prosecution here.

If the parties desire to maintain the relations of man and wife, they must change their domicile and go to some State or country where the laws recognize the validity of such marriages.

Upon the whole case, I am opinion that there is no error in the judgment of the Circuit Court affirming the judgment of the county court, and that both be affirmed by this court.

Judgment affirmed.

The other judges concurred in the opinion of CHRISTIAN, J.

CASES

IN THE

SUPREME COURT

OF

WISCONSIN.

CLINE V. LIBBY.

(46 Wis. 122.)

Chattel mortgage — stipulation that mortgagee may take possession.

A provision in a chattel mortgage that the mortgagee may take possession and sell whenever he deems himself insecure, confers an arbitrary right on the mortgagee, which he may exercise without showing or having any reasonable ground, and the exercise of this right will not be restrained by injunction.

SUIT for injunction to restrain a chattel mortgagee from selling until the maturity of the debt. The injunction was granted below. The opinion sufficiently states the point.

Perry & Hetzel with Geo. W. Burnell, for appellant.

Patchin, Weed & Lester, for respondent.

COLE, J. The injunction order in this case seems obnoxious to the objection taken to it by defendant's counsel, of being a violation of the rights of the mortgagee under the mortgages, and

really an attempt on the part of the learned Circuit Court rather to make a new contract for the parties than to enforce the one which they themselves had made. It is axiomatic in the law, that courts have no authority to make contracts for parties which will accord with judicial notions of fitness and propriety. GIBSON, C. J., in *Bash v. Bash*, 9 Penn. St. 260. By the several mortgages, the mortgagee had the right, at any time when she might deem herself insecure, to take possession of the mortgaged property, and sell the same at public or private sale to pay the notes. This was the stipulation of the parties. In *Huebner v. Koebke*, 42 Wis. 319, this court had occasion to place a construction on such a clause in a chattel mortgage. It held that it vested an absolute discretion in the mortgagee to take possession of the property when he might deem himself insecure, and that the exercise of this right did not depend upon the fact that the mortgagee had reasonable ground for deeming himself insecure. In the order, the Circuit Court utterly ignored or annulled that clause in the mortgages, by enjoining the defendant from interfering in any manner with the mortgaged property. The order contains other conditions which we deem equally unauthorized, in respect to additional security tendered by the plaintiff; and also in regard to the plaintiff's making an inventory of the mortgaged property, and paying over one-fourth of the proceeds of the sales thereof to the Bank of New London, to be applied on the notes as they became due. It is true, the plaintiff does not complain of these conditions; but the defendant may well object to such a disposition of the mortgaged property. For she was entitled to the possession of that property whenever she should deem herself insecure. She was proceeding to exercise the right of taking possession, when she was enjoined.

It is claimed, however, that it was a proper exercise of the jurisdiction of a court of equity to restrain the defendant from asserting this legal right. The case of *Williamson v. New Albany, etc., Railroad Co.*, 1 Biss. 198, and other authorities, are cited in support of this position, and to the point that a court of equity will not enforce penalties but relieve against them. It is certainly familiar doctrine, that equity will relieve against penalties and forfeitures; but it has no application to the case at bar. In *Williamson v. Railroad Co.*, Mr. Justice McLEAN declined, on the application of the trustee, to appoint a receiver of the railroad property in a foreclosure suit for default of payment of interest, holding

that the appointment of a receiver in such a case was not a matter of course, but rested in the sound discretion of the court. And it was while considering that question that Judge McLEAN makes the remark quoted in the brief of plaintiff's counsel, to the effect that "where there is a hard and unconscionable contract, a court of equity will withhold its aid, and leave the party to his remedy at law." But there is a marked distinction between that case and the one before us. Here, the mortgagee is not seeking the aid of a court of equity to enforce the contract; nor is there any ground for saying that the clause in the mortgage in regard to the defendant's taking possession of the property when she deemed herself insecure is a hard or unconscionable agreement. The execution of a chattel mortgage vests in the mortgagee the legal title subject to be defeated by the performance of the condition. The right of possession ordinarily follows that of property, and both would pass under the transfer, in the absence of any express or implied agreement for the retention of the property by the mortgagor. *Hall v. Sampson*, 35 N. Y. 274. And except as against the parties thereto, our statute makes the mortgage invalid, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or the mortgage or a copy thereof be filed in the proper office. *Tay. Stats.*, ch. 107, § 9. Where the mortgagor had the right to retain possession for a stipulated period, it was held in *Ford v. Ransom*, 8 Abb. Pr. (N. S.) 416, that he might, by an injunction, prevent the mortgagee from taking possession before the expiration of the time limited. But we have not been referred to any case where an injunction was granted to restrain the mortgagee from asserting his possessory right under a clause in the mortgage like the one in question.

The order appealed from must be reversed, and the cause remanded with directions to dismiss the complaint.

BY THE COURT.—So ordered.

Judgment reversed and cause remanded.

Whitney v. Clifford.

WHITNEY V. CLIFFORD.

(46 Wis. 138.)

Contract—hiring or leasing—liability of owner of premises for injury by defective condition.

By agreement between D. and C., D. agreed to operate during a specified season a shingle mill, "in the possession and under the control" of C., and to manufacture in a specified manner shingles from logs to be furnished by C., for a specified compensation per thousand, D. to hire and pay the employees and to furnish certain tools and appliances, and to pay for repairs of the machinery not exceeding \$5 in cost, and to load the shingles in a specified manner, at the expense of C. above a specified amount and until a certain event, and afterward at his own expense; C. to remove refuse from the grounds, to put the mill in running order, and furnish logs to keep the mill in operation; accounts to be taken weekly, and settlements and payments to be made monthly to D. "of the amount due for manufacturing said shingles;" D. to have the use and benefit of certain of the imperfect product unless C. elected to pay him a specified amount for manufacturing the same. During the operation of the mill under this contract, sparks from a defective smoke-stack in the mill set fire to and consumed lumber belonging to the plaintiff. In an action against C. therefor, *held*, (1) that the contract between C. and D. was of hiring and not of lease; (2) the defect having existed when D. took possession, and the mill having been used by him in the ordinary manner, C. was liable, although the strict relation of master and servant did not exist between C. and D.

ACTION for negligence. The opinion states the facts. The defendant had judgment below.

G. W. Cate and Jones & Sanborn, for appellant.

Raymond & Haseltine, for respondent.

TAYLOR, J. This action is brought to recover damages for burning a large quantity of lumber belonging to the plaintiff. The complaint charges that the fire was communicated to the lumber by sparks and cinders emitted from the smoke-stack of a shingle mill belonging to and used by the defendant at the time of the accident. Upon the trial in the court below the learned Circuit judge directed a nonsuit, and judgment was entered against the plaintiff.

The only ground upon which it is contended in this court that the nonsuit was properly ordered is, that the defendant at the time of the fire was not in possession of the mill, and that one A. F. Dodge was in such possession and had the exclusive control of the running and use of the same, under a written contract with the defendant.

It is urged by the learned counsel for the respondent that the contract referred to created the relation of landlord and tenant between the defendant and Dodge, and that Dodge, being in the actual possession and use of the mill at the time of the fire, as tenant, is alone responsible for the injury occasioned to the plaintiff by reason of the fire communicated by the sparks and cinders emitted from the smoke-stack of said mill. It is also insisted that if the relation of landlord and tenant did not exist between the defendant and Dodge, yet, by the provisions of the contract, the possession and control of the use of the same was in Dodge at the time, and therefore the defendant is not liable for the damages caused by the use of such mill.

Upon this appeal it is unnecessary to examine any other questions than the ones above stated, as it is quite evident that upon other points of defense to the action there was sufficient evidence to entitle the plaintiff to have the same submitted to the jury.

The following is a copy of the contract between the defendant Clifford and Dodge, under which it is claimed that Dodge was in possession and running the mill when the fire occurred:

"It is hereby agreed by and between A. F. Dodge, of the city of Stevens Point in the county of Portage and State of Wisconsin, and William J. Clifford of the same place, that said Dodge shall work and operate, during the milling season of 1877, a certain shingle mill situate in the city of Stevens Point, which said mill is now in the possession and under the control of said Clifford, and shall manufacture shingles from logs to be furnished by said Clifford as hereinafter stated. It is further agreed by and between said parties that said Clifford shall pay to said Dodge the following rates for manufacturing said shingles: For the brand known as Star A. Star, 60 cents per thousand, and for the brand known as Shaded A., 42½ cents per thousand. It is further agreed by and between said parties that said shingles shall be made and put up in a good and workmanlike manner, and that said Dodge shall hire and pay all the men employed in the manufacture of said

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shingles, and shall furnish all bands, band-iron, oil, nails and files, in the manufacture of said shingles, and shall pay for repairing all breaks in the machinery of the said mill, when the cost of said repairs shall not exceed \$5; any break in the machinery of said mill, the repairing of which will cost more than \$5, to be paid for by said Clifford. It is further agreed by and between said parties, that said Dodge shall load all shingles so manufactured as aforesaid on the cars on the switch of said mill, said Clifford to pay all expenses for loading said shingles over and above the sum of \$1.25 per car, until such time as a new side track to said mill shall be completed; after the completion of said side track said loading to be done by the said Dodge, and included in said amount to be paid for manufacturing said shingles. It is further agreed by and between said parties that said Clifford shall remove, or cause to be removed, all slabs and refuse timber from the grounds of said mill, so that the amount of said slabs and refuse timber on the grounds of said mill shall not at any time exceed ten cords. It is further agreed by and between said parties, that said Clifford shall take an account of all the shingles manufactured during each week, at the end thereof, and shall credit said Dodge with the amount. And it is further agreed by and between said parties, that said Clifford shall settle with said Dodge on the first day of each month, and shall at that time pay said Dodge the amount due for manufacturing said shingles at the price above stated. It is further agreed by and between said parties, that said Clifford shall furnish to said Dodge good and suitable logs for shingles, to be manufactured as aforesaid, said logs to be delivered in the mill boom by said Clifford, and that said Clifford shall put said mill in good running order and furnish logs as aforesaid in sufficient number to keep said mill running during the running season of 1877. It is further agreed by and between said parties, that all shingles less than four inches, clear from knots in butt, may be packed and sold by said Dodge for his separate use and benefit, or said Clifford shall have the right to take said shingles less than four inches clear, by paying said Dodge 25 cents per thousand for manufacturing good shingles."

After a careful consideration of the provisions of this contract, we think it is not a lease of the mill by Clifford to Dodge. Nothing in the language of the contract indicates that the parties intended it as such, and there does not appear to be any thing in the nature

of the contract which necessarily creates the relation of landlord and tenant. All the circumstances of the respective parties, as indicated by the terms of the contract, show that it was a hiring by Clifford of Dodge to manufacture certain logs owned by Clifford into shingles, Clifford furnishing the machinery for manufacturing the same, and Dodge furnishing the labor and other necessary things to run the machinery, pack the shingles and deliver the same on the cars at the mill, at a fixed price per thousand for the shingles manufactured, according to quality. Clifford was to put the machinery in good repair, and to repair all breakages costing more than \$5.

Dodge acquired no right under the contract to use the mill for any other purpose than that of manufacturing the logs furnished by Clifford. The sole object of the contract, on the part of Clifford, it would seem, was to get his pine lumber manufactured into shingles, not to get a rent for his mill. He furnished the machinery to manufacture the shingles, and thereby lessened to himself the cost of their manufacture to the extent which the use of such machinery was worth in the manufacture of the same. Instead of hiring men by the day or month, at fixed wages, to manufacture his logs into shingles, he employs one man to do the whole work, employing his own help, paying him according to the quantity and quality of shingles manufactured, thereby relieving himself from all the details of the work of manufacturing, and at the same time securing speed and faithful work in the manufacture, by making the earnings depend upon the quantity and quality manufactured. Again, the provision in the contract that Clifford is to keep the premises clear of slabs and refuse, so that Dodge will not be embarrassed in the use of the mill and machinery, indicates very clearly that he was to have the possession and use of the mill and machinery for the single purpose of doing the work of Clifford. The furnishing, by Clifford, of machinery in the nature of real estate necessary to manufacture the shingles, no more constituted Dodge his tenant than if he had furnished him machinery which was strictly chattels. That this was strictly a contract for the performance of labor is evident, if we consider the question as to who was the owner of the shingles during the process of manufacture and when their manufacture was completed. It is evident that the title of the shingles during all three stages of manufacture remained in Clifford, and not in Dodge. Under the contract,

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Dodge had no right to run the machinery a day or an hour except in the manufacture of shingles for Clifford out of materials furnished by him. The effective words of the contract are, that Dodge "shall operate the mill now in the possession and control of Clifford, and shall manufacture shingles from logs to be furnished by said Clifford, * * * * and that Clifford shall pay the following rates for manufacturing said shingles:" clearly a hiring on the part of Clifford, accompanied on his part by an agreement that Dodge, in the performance of the work agreed to be done by him, shall have the use of certain machinery of Clifford's. In case Clifford had refused to furnish any logs to be manufactured under the contract, and refused to permit Dodge to use the mill any way, Dodge could not have recovered as damages what the use of the mill would have been worth for the season. His damages, if any, would have been the difference between the price he was to receive for the manufactured shingles under the contract, less the cost of such manufacture under the terms of the contract.

The case of *Jolly v. Single*, 16 Wis. 280, cited by the learned counsel for the respondent, does not conflict with the construction we put upon the contract in this case. In that case the original contract is not in the record, but it was claimed that it was set out in the answer, and the answer alleges that there was a lease of the mill, and that the rent reserved to the landlord was two-ninths of all the lumber manufactured in said mill. It would seem, from the statement of the case, that the contract was in the form of a lease, with rent reserved.

The case of *Walls v. Preston*, 25 Cal. 60, also cited by respondent's counsel, was a case in which the contract itself was in the form of a lease in all its parts, and formally demised and let the premises for a fixed term to the tenant. And it was contended that it did not create the relation of landlord and tenant, only because the landlord was to receive as rent one-sixth of all the crops raised. The court held it was a lease, and we think very properly so held.

The case of *Fisk v. Framingham Manufacturing Company*, 14 Pick. 491, also cited by the counsel for the respondent, is one which in some of its facts is quite similar to the contract in the case at bar, and to some extent favors the construction put upon the contract by the counsel for respondent.

The report of that case does not set out the entire contract and

there were at least two provisions in that part which is set out in the report, which seemed to be of great weight in giving the construction which was adopted by the court, which are not found in the contract in the case at bar. One of these provisions was, that the party running the mill was to have the use of the land about the factory and the building thereon. And the court argue that under this clause he would have the right to receive rent for those buildings from the laborers or others who occupied them. The other provision was, "that no rent is to be charged by the company." The court say of this that it tends to prove that a letting was contemplated.

The court, also, in that case, laid great stress upon the provision that the person in possession was to keep the factory in repair, except that the owners were to repair the main gearing. In this it also differs from the contract in this case. The person running the mill in the case at bar was only to repair slight breaks in machinery; all breaks or repairs involving any considerable outlay of money were to be made by the owner, Clifford. And in addition, the owner was to keep the premises clear of all slabs and refuse, so that the contractor should have the free use of the machinery to do his work.

It will be seen, also, that there are no words in the contract in this case giving the possession of the mill and machinery to the contractor, the language being, "that Dodge shall work and operate and manufacture shingles out of the logs of Clifford;" nor are there any words requiring the contractor to surrender or deliver the possession at the end of the season to the owner, Clifford.

But it is argued by the counsel for the respondent, that admitting the contract did not create the relation of landlord and tenant between Clifford and Dodge, yet under it Dodge was in the actual possession of the premises, and using them under a contract which entirely excludes the assumption that he was the agent or servant of the defendant at the time the fire occurred, and therefore the defendant is not liable to the plaintiff for the damages sustained by him by reason of the escape of the sparks and cinders from the smoke-stack of the mill while so used by Dodge.

If it should be admitted that under the contract between Clifford and Dodge, Dodge was in no way under the control or direction of Clifford as to the manner of doing the work agreed to be done by

him, and that the relation of master and servant, in its strict and ordinary sense, did not exist between them, still we are of the opinion that Clifford must be held liable for any damages which resulted to the plaintiff from the use of the mill by Dodge.

By the terms of the contract, Clifford obligated Dodge to use his mill in performance of the work he employed him to do, and he also agreed to put the same in good running order for the use of Dodge. The evidence shows, that as to the defect complained of, the mill was in the same condition at the time the accident happened as when Dodge took possession, and it does not show that Dodge used the mill in a way which differed materially from the ordinary use of such mills. The case falls clearly within the rule laid down by this court in the case of *Hundhausen v. Bond*, 36 Wis. 29, that "when the obstruction or defect which occasioned the injury results directly from the acts which the contractor has agreed and is authorized by his employer to do, the employer is also liable to the injured party." The rule above stated is laid down in *Robbins v. Chicago*, 4 Wall. 657, as follows: "When the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is, that the employer is not liable; but when the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party." The rule was stated a little differently in the same case reported in 2 Black, 418-28, "that if the nuisance necessarily occurs in the ordinary mode of doing the work, the occupant or owner is liable; but if it is from the negligence of the contractor or his servants, then he alone should be responsible." In the case of *Ellis v. Sheffield Gas Co.*, 2 El. & Bl. 769, Lord CAMPBELL, C. J. says: "I am clearly of the opinion that if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself;" and this rule was approved by all the other judges.

The same rule is approved in *Storrs v. City of Utica*, 17 N. Y. 104; *Lowell v. B. & L. R. Corp.*, 23 Pick. 24; *Hole v. Railway Co.*, 6 H. & N. 497; *Bush v. Steinman*, 1 B. & P. 404.

In the case at bar, the defendant employed Dodge to manufacture his logs into shingles, and, for his own benefit and advantage,

stipulated in the contract that Dodge should use his mill in the performance of the work. The damage complained of by the plaintiff was the result of the use of such mill by Dodge in doing the work contracted to be done for the defendant, and there is no evidence, at all events no conclusive evidence, that Dodge used the mill otherwise than such mills are ordinarily used, in the performance of the plaintiff's work; and the clear tendency of the evidence is to prove that the accident happened from a defect in the construction of the mill itself, for which defect Dodge was in no manner responsible.

It seems to us very clear that in such case the person who directs, for his own benefit and advantage, the use of the dangerous thing, should be held liable for all damages resulting from such use.

If the defendant's mill was so constructed, that when used in the ordinary way of using such mills, it endangered the property of others in its vicinity, and his contract with Dodge required him to use such mill in doing his work, there can be no doubt that the owner should be held liable for the damages occurring to other persons resulting from such use.

Whether this rule would hold good if the relation of landlord and tenant existed between the defendant and Dodge, it is unnecessary to decide in this case.

In our view of the law applicable to the case, there was sufficient evidence upon all the points necessary to sustain the plaintiff's action, to entitle him to have the same submitted to the jury, and it was error for the learned Circuit judge to direct a nonsuit.

BY THE COURT.—The judgment of the Circuit Court is reversed, and a new trial ordered.

Judgment reversed.

NOYES V. STATE.

(46 Wis. 260.)

Costs — not recoverable against State.

A judgment of the Federal Supreme Court against the State of Wisconsin, for costs in a criminal action, does not constitute a just claim against the

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State within the statute conferring on the State courts jurisdiction of actions against the State. (*See note, p. 715.*)

License fees voluntarily paid the State under an invalid statute cannot be recovered.*

ACTION on a judgment. The opinion states the case. The plaintiff had judgment below.

J. P. C. Cottrill, for plaintiff.

Attorney-General, for the State.

RYAN, C. J. 1. The first count of the complaint is upon a judgment in this court, in favor of one Morrill, for costs in the Supreme Court of the United States, assigned to the plaintiff. A criminal prosecution was instituted by the State against Morrill, for violation of chapter 72 of 1870. He was convicted, and brought the case by writ of error to this court, where the conviction was affirmed. *Morrill v. State*, 38 Wis. 428. He then took his writ of error to the Supreme Court of the United States, which reversed the judgment on a Federal question. The judgment of reversal awarded costs against the State; and the judgment entered in this court, on filing the mandate of that court, also awarded the costs of the Federal Supreme Court against the State.

Whether the judgment for costs in the Federal Supreme Court went by inadvertence or upon consideration, it is impossible here to understand. That court holds that costs cannot be awarded against the United States. *The Antelope*, 12 Wheat. 546; *U. S. v. Boyd*, 5 How. 29. These were both civil actions. The rule would of course be more imperative in criminal cases prosecuted by the United States in their sovereign capacity.

At the common law, costs were unknown. Costs are altogether the creature of statute. Speaking of the statute of Gloucester, 6 Edw. I, Sir EDWARD COKE says: "Before this statute, at the common law, no man recovered costs of sute, either in plea real, personall or mixt; by this it may be collected that justice was good cheap of auncient times, for in king Alfred's time there were no writs of grace, but all writs remedialls were graunted freely." 2 Inst. 288. And no known statute gave costs against the crown.

In this State, therefore, costs are regulated exclusively by

*To the same effect *Detroit v. Martin* (34 Mich. 170), 22 Am. Rep. 512, and note, 512.

statute. As a rule, costs are given to the prevailing party in civil actions. And the statutes giving them might include the State, when it sues or permits itself to be sued in civil actions. There is a broad distinction between the *status* of a State instituting a prosecution in its sovereign capacity, to assert its sovereign rights, to enforce its public laws, or to protect its citizens, and the *status* of a State suing to enforce mere rights of property, as a private person might do in like case. *Penn. v. Wheeling Bridge Co.*, 13 How. 518. And however it may be when the State is a party to a civil action, to represent its rights of property, no statute authorizes the recovery of costs against the State in criminal prosecutions, upon judgment of acquittal or judgment of reversal in this court. No costs are recoverable in criminal prosecutions, even against defendants, except by express statute. *Faust v. State*, 45 Wis. 273.

On what ground of authority the Supreme Court of the United States assumed to render judgment for costs against the State in its sovereign capacity, in the case of Morrill, it is difficult to conjecture. The judgment may not improbably have gone upon mere misprision of the clerk. Be that as it may, it is very certain that no statute of this State gives any authority to this court to render judgment for costs against the State in a criminal prosecution; and that this court has no jurisdiction to render such a judgment, even were it so ordered by the mandate of the Supreme Court of the United States. The jurisdiction of this court must come by the Constitution and laws of the State. The Federal Supreme Court cannot confer it; though it may, in cases involving Federal questions, control its exercise.

But the judgment in this court for the costs of the Federal court is not within the mandate of that court. After reciting the judgment for costs in that court the mandate sends the cause back to this court, "with instructions to enter a judgment reversing the judgment of the Circuit Court, and directing that court to discharge the defendant from imprisonment, and to suffer him to depart without day," and "that such execution and further proceedings may be had in the said cause, in conformity to the judgment and decree of this court above stated, as, according to right and justice and the Constitution and laws of the United States, ought to be had therein." There is no mandate to render judgment here for costs. The execution and further proceedings ordered were fulfilled upon the reversal of the judgment of the

Circuit Court and the direction to that court to discharge the defendant.

Upon whatever principle the Federal court adjudged costs against the State, it is quite manifest on the face of its mandate that it did not assume to direct this court to render such a judgment. And it is not a little curious that, while the judgment entered in this court gives the costs of the Federal court, it does not assume to give the costs of this court or of the Circuit Court, thus recognizing that the State is not liable to costs in such a prosecution.

The judgment for costs is a blunder, though a blunder too grave to be lightly treated. The court then consisted of three members only, and the chief justice was necessarily absent. The mind of neither of the justices sitting appears to have gone to the judgment. The counsel of Morrill gave the clerk a draft of the judgment, as it is entered, and the clerk appears to have entered it by the consideration and judgment of the counsel, not of the court. The court appears to have assumed that the proper judgment would be entered. But it must share the censure, as no judgment in such a case should be permitted to pass without examination by the court.

So much of the judgment of this court as awards costs against the State is void. It is unnecessary to express any opinion on the effect of the judgment for costs of the Federal Supreme Court. It is sufficient to hold that it is not a just claim against the State, within the meaning of the statute conferring jurisdiction on this court of actions against the State.

2. In the case of *Morrill v. State*, the Federal Supreme Court held certain provisions of chapter 72 of 1870 to be in conflict with the Constitution of the United States and void. The second count of the complaint seeks to recover several license fees exacted and paid under such void provision, by persons employed by the plaintiffs firm as peddlers to sell goods of the firm. So far as such payments may have been voluntary they cannot be recovered back. *Van Buren v. Downing*, 41 Wis. 122. But so far as they were made under duress or menace equivalent to duress by public officers, they constitute a valid claim against the State. *Matheson v. Mazomanie*, 20 Wis. 101; *Kellogg v. Supervisors*, 42 id. 97; *Allen v. Burlington*, 45 Vt. 202; *Atwell v. Zeluff*, 26 Mich. 118; *Bank v. Mayor, etc.*, 43 N. Y. 184; *Union Bank v. Mayor, etc.*, 51 id. 638, reversing s. c., 51 Barb. 159.

Prima facie, the right of action to recover back each license fee paid under duress or menace would be in the peddler who paid it. Although the peddlers from whom the license fees set forth in the count were exacted may have been employed by the plaintiff's firm, yet in their relations to the State they were mere peddlers, each in his individual capacity and right. The license fee of each, by whomsoever actually paid, was necessarily paid in the name and right of the peddler who took the license. And the duress or menace which could make the payment involuntary should apparently be of the peddler himself. It is not apparent how duress or menace of the plaintiff's firm could affect the payment of the peddler.

An assignment by the plaintiff's partner is averred, but no assignments from the peddlers. The mere fact that the peddlers were employed by the plaintiff's firm as averred does not appear to vest the right of action in the plaintiff. And indeed there is such confusion and conflict of averment in the count that it appears impossible to determine by whom the payments to the State were actually made, the peddlers or the plaintiff's firm, or upon whom the duress or menace operated, the plaintiff's firm or the peddlers. The uncertainty, or perhaps more properly the duplicity, of the count in this respect is so great as to leave it without any certain and definite cause of action.

It is quite possible, however, that an amendment of this count may disclose a valid claim against the State. Leave will therefore be given to amend it.

3. What is said of the first count is conclusive of the third. The first count goes upon the right to recover taxable costs of a criminal prosecution which failed. The third count goes for counsel fees and other incidental expenses incurred in the defense of the criminal prosecution. The plaintiff has just the same right to recover for these as any person prosecuted for any crime and acquitted. If there is no right in such cases to recover taxable costs, *a fortiori* there is none to recover counsel fees and other expenses. It is the solemn duty of the court, as it was of the legislature, to protect the State against such an extravagant claim.

BY THE COURT. — The several demurrers of the attorney-general to the three causes of action in the complaint are sustained. But leave is given to the plaintiff to amend the second cause of action.

Demurrers sustained.

Hazeltime v. Case.

NOTE BY THE REPORTER. — In *U. S. ex rel. Phillips v. Gaines*, the United States Supreme Court, at October Term, 1879, held as follows:

Costs in criminal proceedings are a creature of statute, and a court has no power to award them unless some statute has conferred it. By the common law, the public pays no costs. In England, the king does not, and the State stands in the place of the king. And where a statute of a State provides for the payment of costs by the State in criminal cases where the defendant is acquitted, mandamus will not lie to the State officers to enforce it, when the prerequisites imposed by the statute have not been complied with.

HAZELTIME V. CASE.

(46 Wis. 391.)

Water-course — right of upper proprietors.

In an action by a lower against an upper riparian owner on a stream, for fouling the stream by means of a hog yard, and depriving him of its use for domestic purposes, an instruction, that if the stream in its natural state was more useful to all the owners for stock purposes than for ordinary domestic uses, the upper owner had a right reasonably so to use it, in spite of the injury complained of, is correct.

ACTION of damages, for injury by the maintenance by defendant, upon his premises on a natural water-course, higher up than those of the plaintiff, of a hog yard, whereby the stream was fouled and rendered unfit for plaintiff's use. The plaintiff had judgment below. The opinion states the point.

Vilas & Bryant, for appellant.

John Barker and J. W. Lusk, for respondent.

COLE, J. The question whether the defendant made a lawful or reasonable use of the stream, under the circumstances, was one for the jury to determine, upon the evidence. The learned Circuit Court stated to the jury certain principles of law applicable to the use of water in running streams, a violation of which would constitute a nuisance. The court, in effect, charged that each riparian proprietor was entitled to the use and enjoyment of the stream in its natural flow, subject to its reasonable use by other proprietors; that each proprietor had an equal right to the use of the stream for the ordinary purposes of his house and farm, and for the purpose of watering his stock, even though such use might, in some degree, lessen the volume of the stream or affect the purity of the water; that the lower proprietor had no superior right in this regard over a proprietor higher up on the stream, because each was entitled to

Mamlock v. Fairbanks.

make a beneficial and reasonable use of the stream in its natural state; that if, in its natural state, the stream was useful both for domestic or household purposes and for watering stock, but the use for ordinary stock purposes was more valuable or beneficial for all the owners along the stream than the use for domestic purposes, then the less valuable must yield to the more valuable use; but that its reasonable use for all purposes should be preserved, if possible. And the jury were told that they must determine from all the facts proven, taking into account the size, nature and condition of the stream, whether the defendant made a reasonable and proper use of it by keeping a large number of hogs confined near it, or permitting such animals to go into the stream and wallow in the water. This is the substance of the charge; and we do not see that the defendant has any valid ground of objection to it on this branch of the case. For it seems fairly to have submitted the question as to the reasonableness of the use of the stream by the defendant, and whether he used the water, under the circumstances, in a reasonable and proper manner. This is all we deem it necessary to say in regard to a number of exceptions taken to a refusal of the court to give certain instructions asked on the part of the defendant, as well as exceptions to the charge given on this point.

[Omitting other points.]

Judgment affirmed.

RYAN, C. J., took no part.

MAMLOCK V. FAIRBANKS.

(46 Wis. 415.)

Fraud — sale — representations in good faith — vendee's laches.

In the absence of artifice, a sale will not be set aside on the ground that it was procured by false and fraudulent representations, if the vendor believed them true, and the vendee had equal opportunity and means for ascertaining their falsity *

ACTION to set aside a contract. The opinion states the case. The plaintiff had judgment below.

Cotzhausen, Smith, Sylvester & Scheiber. for appellant.

R. N. Austin, for respondent.

ORTON, J. This action is brought to set aside the contract by which the plaintiff, by her agent, one Marcus Silber, purchased of the defendant a certain note and mortgage executed by one John F. Randall to one John E. Ackerman, and to recover back the purchase-money therefor on the ground of false and fraudulent representations made by the defendant to the agent, Silber, at the time of the purchase, as to the adequacy of the mortgage security, and as to the responsibility, identity and residence of the parties, which formed the inducement of the contract.

On the trial, the agent, Silber, testified that he did not rely upon the security of the mortgage, but upon the responsibility and credit of the parties ; therefore the material ground of the action was the false statement by the defendant of the identity and residence of Randall and Ackerman. It appeared that the residence of both were stated in the formal parts of the mortgage, and a certificate of satisfaction accompanying the same, the former as being of the town of Lind, of the county of Waupaca, and the latter as being of the village of Waupun, Fond du Lac county ; and that the mortgage was acknowledged by Randall and his wife in Waupaca county. It appeared also, that at the time there was a man by the name of J. Randall residing in the county of Dodge, and a man by the name of J. Ackerman, a justice of the peace in said village of Waupun, both men of good credit and responsibility, and known to be so by the agent, Silber ; that he supposed they were the parties to said note and mortgage ; and that when he asked the defendant if they were the parties to the note and mortgage, the defendant replied that they were. And it further appeared that at the time of the purchase, the agent, Silber, had the note and mortgage in his hand, and opened the mortgage ; that there was nothing to prevent him from examining the papers ; that he could read the English language ; and that his brother examined the mortgage.

It was claimed at the trial by the defendant that Silber had in his hands at the time the papers which showed the residence of both Randall and Ackerman, and therefore knew, or might have known, the truth or falsity of the statement of the defendant as to such residence, and did not rely, or ought not to have relied upon, and was not misled, or ought not to have been misled, by such statement. It was admitted that John F. Randall, the maker of

the note and mortgage, was not said J. Randall of the county of Dodge, and did not reside in that county, and the said Joel E. Ackerman was not a justice of the peace in the village of Waupun. There seems to have been some evidence given upon the question as to whether the agent, Silber, knew, or had the present means of knowing, the truth or falsity of the statement of the defendant complained of; and we think there was at least sufficient evidence on that point to have been submitted to and considered by the jury. The present means of knowledge concerning the subject-matter of the representations of the party complaining, and whether he knew or might or ought to have known the truth, aside from such representations, are always material questions in such a case, and cannot be ignored where there is any proper evidence upon which they can be raised. This doctrine is elementary, and within the principle and reasons of *caveat emptor* (Broom's Maxims, 617), and the rule was well stated by this court in *State v. Green*, 7 Wis. 676, in respect to the crime of obtaining property by false pretenses, as the true rule in all cases of fraud by false representations, that it is not to be extended to the protection of those who, "having the means in their own hands, neglect to protect themselves." The rule as to personal property generally is equally applicable to the subject-matter of the representations in this case, "that if the defects in the subject-matter of sale are patent, or such as might or should be discerned by the exercise of ordinary vigilance, and the buyer has the opportunity of inspecting it, the law does not require the seller to aid and assist the observation of the purchaser." Kerr on Fraud and Mistake, 101. "The law requires men, in their dealings with each other, to exercise proper vigilance, and apply their attention to those particulars which may be supposed to be within reach of their observation and judgment, and not close their eyes to the means of information which are accessible to them." *Vigilantibus non dormientibus jura subveniunt*. This principle is so universally recognized by the authorities that it needs no further reference. But at the same time there is another and concomitant principle to be considered in all such cases, and that is, that the seller must not use any art, or practice any artifice, to conceal defects, or make any representations, or do any act, to throw the purchaser off his guard, or to divert his eye, or to obscure his observation, or to prevent his use of any present means of information. Kerr on Fraud and Mistake, 98.

Kneeland v. Van Valkenburgh.

In this case there was no general verdict for the plaintiff, but the verdict consists of the answers of the jury to certain special questions of fact, none of which embrace this indispensable element or principle, without which the findings are incomplete and insufficient to warrant the legal conclusion of the judgment. For these findings may all be correct, and yet the plaintiff not be entitled to recover, by reason of her having had the present means of knowing that the representations upon which she claims to have relied were false. There was evidence on the trial which not only warranted, but, we think, required, that this specific question should have been considered and answered by the jury. But the learned counsel of the appellant did ask the court to submit to the jury this question in the following instructions, which were refused: "The plaintiff cannot, under the evidence, recover in this action if by the exercise of diligence at the time and place of said representations she might have discovered that they were incorrect." "The plaintiff cannot recover in this action if the defendant believed that the statements alleged to have been made were true, and if the plaintiff had an equal opportunity of ascertaining their truth or falsity." These instructions contain a substantial expression of the rule above considered, and should have been given, and with them the qualification, "unless prevented from the discovery of the truth by the artifice of the defendant." Then the whole case would have been covered and disposed of by the verdict.

BY THE COURT. -- The judgment of the Circuit Court is reversed and the cause remanded for a new trial.

Reversed and remanded.

KNEELAND V. VAN VALKENBURGH.

(46 Wis. 434.)

Boundary — city lot — "line" of street.

A deed of a city lot, bounded on one side by "the south line" of a street, carries to the center of the street, in the absence of any language showing an intention to exclude the street.*

*To same effect, *Oxton v. Groves* (68 Me. 371), 28 Am. Rep. 75.

EJECTMENT for a strip of land 50 feet wide, being the east end of lot number 1 in block 108 in the 7th ward of Milwaukee, and included within the limits of Biddle and Lake streets, and subject to the public easement for a street. The defendant claimed under a conveyance by the plaintiff to his grantors of lot number 1, as follows :

“The following described tract of land situated in the county of Milwaukee, in the State of Wisconsin, and is known as the east part of lot number one (1) in block number one hundred and eight (108) in the first (now 7th) ward of the city of Milwaukee, and bounded as follows, to wit : Commencing at a point on the south line of Biddle street, one hundred (100) feet east of the north-west corner of said lot, thence southerly on a parallel line with Astor street to the north line of lot number two (2) in said block, thence easterly on the north line of said lot two to Lake street, thence northerly on the westerly line of Lake street to the south line of Biddle street, thence westerly on the south line of Biddle street to the place of beginning, being one hundred and eight (108) feet on Biddle street, be the same more or less, but subject to all legal highways.”

The defendant had judgment on demurrer.

E. Mariner and *C. A. Hamilton*, for appellant. By fixing the starting point in the south line of Biddle street, by locating the north-west corner of lot 1 at a point in the south line of that street, by making said south line and the westerly line of Lake street the boundaries of the grant, and by giving exact measurements, which, as well as the boundaries, exclude the premises here in question, the deed shows clearly an intent to exclude them. *Barton v. Dawes*, 10 C. B. 261; *Llewellyn v. Jersey*, 11 M. & W. 182; *Dana v. Bank*, 10 Metc. 250; *Smith v. Slocomb*, 9 Gray, 36; *Franklin Wharf Co. v. Portland*, 47 Me. 42; *Coster v. Peters*, 5 Rob. 204; *Jackson v. Hathaway*, 15 Johns. 447; *Jones v. Cowman*, 2 Sandf. S. C. 234; *Child v. Starr*, 4 Hill, 369; *Babcock v. Utter*, 1 Keyes, 410; *Sherman v. McKeon*, 38 N. Y. 266-272; *English v. Brennan*, 60 id. 609; *Drew v. Swift*, 46 id. 204; *White's Bank v. Nichols*, 64 id. 65; *Gove v. White*, 20 Wis. 447; 3 Washb. R. P. 410, 420. notes.

Frank B. Van Valkenburgh, with *Cottrill, Cary & Hanson*, for respondent.

LYON, J. If the deed of 1850, executed by the plaintiff to Mrs. Todd, conveyed to her the land in controversy, the plaintiff cannot recover in this action ; for it is essential to a recovery that he show title in himself. The counter-claim avers, and the reply admits the execution of that deed, and if it conveyed the land claimed, it is obvious that the reply contains no defense to the counter-claim, and that the demurrer was properly sustained. Hence the statement in the brief of the learned counsel for the appellant, that "the substantial question is whether appellant's deed to Todd conveyed the premises in suit," is entirely accurate.

The rule by which this question must be solved is thus stated in *Pettibone v. Hamilton*, 40 Wis. 402. "In *Kimball v. City of Kenosha*, 4 Wis. 321, decided in 1855, it was held that the grantee of a lot bounded by a public street in a recorded town plat, whether the lot is designated in the conveyance thereof by its proper number on the plat, or by some other appropriate description, takes to the center of such street, subject only to the public easement, unless the street is expressly excluded from the grant by something appearing upon the plat or by the terms of the conveyance. This doctrine has since been repeatedly reaffirmed by this court, and is now too firmly established to be disputed or drawn in question. *Goodall v. Milwaukee*, 5 Wis. 32; *Milwaukee v. Mill & Beloit R. R. Co.*, 7 id. 85; *Ford v. Chicago & N. W. Railway Co.*, 14 id. 609; *Weisbrod v. Same*, 18 id. 36; s. c., 20 id. 419; s. c., 21 id. 602." (p. 410.)

The deed to Mrs. Todd does not convey a given lot by its number, but it conveys to her a portion of a given lot by appropriate description, that is, by metes and bounds. It is true that the designated boundary lines of the premises conveyed are the lines between lot 1 and the abutting streets, as those lines would usually be marked on a map or plat, but there is not in the terms of the deed any express exclusion of the land between those lines and the centers of the streets. The rule above stated will not permit an inference of intention to exclude the streets from the mere fact that the boundary lines specified in the grant are outside the limits of the streets. It was substantially so ruled in *Pettibone v. Hamilton*, *supra*. We also think there is sufficient in the deed to Mrs. Todd to show that the plaintiff did not intend to limit the grant to the outer lines of the streets. It is stated therein that the land conveyed "is known as the east part of lot number 1," etc.

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Counsel for plaintiff argues that the use of the words "known as" in the description destroys its significance as manifesting an intention to convey the east part of the lot. We think otherwise. A conveyance of a lot in a given plat, "known as lot 1," or of a parcel of land "known as the N. W. 1-4 of section 1," in a specified township and range, without further description, would undoubtedly convey the whole of the lot or quarter-section, even though the same included a larger area than it was generally supposed to include. The better opinion seems to be, that these words, unexplained by the context, are a mere formula to which no restrictive effect can be given when they so occur in a grant. Hence we think the deed to Mrs. Todd describes the premises conveyed to her as the east part of lot 1; and that part of the lot necessarily extends to the center of the streets. The conveyance was also made expressly, "subject to all legal highways." Unless it extends the grant into the abutting streets, it does not appear that there were any highways upon the premises conveyed.

For the purposes of this appeal we must assume, under the pleadings, that Biddle street and Lake street are public highways, and our judgment is based on that hypothesis.

We conclude that Mrs. Todd took to the center of the abutting streets under her deed from the plaintiff, and hence, that this action cannot be maintained under the present pleadings.

BY THE COURT. — Order affirmed.

RYAN, C. J., took no part.

A motion for a rehearing was denied.

WILLIAMS V. WILLIAMS.

(48 Wis. 464.)

Marriage — cohabitation — presumption.

Cohabitation, originally illicit, is presumed so to continue, unless a subsequent actual contract of marriage is proved.

ACTION for dower.

The case is thus stated by TAYLOR, J.

"This action is brought by the plaintiff to recover dower in certain lands in the possession of the defendant.

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"The plaintiff bases her claim for dower upon the allegation that she is the widow of one Lewis Williams, Sr., deceased.

"The only question which is seriously litigated is, whether the plaintiff is the widow of said deceased. The evidence shows that the plaintiff was married by a formal marriage ceremony to said Lewis Williams, Sr., on the 9th day of May, 1870, and tends to show that she lived with him as his wife from that time to the time of his death, August 20, 1873.

"The appellant claims that at the time plaintiff married the deceased, she was the lawful wife of one William Jones, who was then living and not divorced from the plaintiff. The plaintiff does not deny that she had been married to said Jones and had lived with him as his wife, but she alleges and shows that she was duly and lawfully divorced from him by the judgment of the Circuit Court of Kenosha county in this State, in the month of November, 1870.

"It appears from the stipulation of the parties, that such divorce suit was instituted by the plaintiff in this action by the name of Jane Jones, and that she alleged in her complaint therein, that she and the said William Jones were duly and lawfully married in Wales, in the year 1863. Such action was commenced in October, 1870; the complaint was sworn to by the plaintiff; the summons was personally served on the defendant William Jones; and as a ground for the divorce, the complainant charged the said William Jones with willful desertion for more than one year before the commencement of such action. The judgment in that action was entered in November, 1870, and decreed and adjudged that the marriage theretofore existing between the said Jane Jones and the said William Jones be and the same was thereby dissolved, and each of the parties freed from the obligations thereof.

"The plaintiff further gave evidence tending to prove that at the time of her marriage to William Jones, he (Jones) had another wife living, from whom he had not been divorced, and who is still living.

"The plaintiff recovered in the action in the court below, and the defendant appealed to this court."

John T. Fish, for appellant.

J. V. Quarles, for respondent. If persons under a disability

come together intending and choosing illicit commerce, it may be that no presumption that they have changed their minds arises from a continuance of the relation after the impediment is removed; though there are authorities against this position. But it would be contrary alike to reason and authority, to hold that a similar rule would obtain where the intention and choice of the parties were manifestly innocent. The better authority is, that under the circumstances present in this case, a marriage may be inferred after the removal of the disability, even though the facts indicate that no formal consent was ever afterward interchanged. 1 Phillips on Ev. (C. H. & E. notes), 631; 1 Bish. on Mar. & Div., §§ 506, 508, and cases there cited; *Jackson v. Claw*, 18 Johns. 347, 350; *Fenton v. Reed*, 4 id. 52, 54; *Rose v. Clark*, 8 Pai. 574, 580 *et seq.*; *In re Taylor*, 9 id. 611, 614 *et seq.*; *Physick's Estate*, 2 Phila. 278; *McReynolds v. State*, 5 Cold. 18; *Holabird v. Ins. Co.*, 12 Am. Law Reg. (N. S.) 566, 568; *Wilkinson v. Payne*, 4 T. R. 468; *Lyle v. Ellwood*, 11 Moak's Eng. R. 702, 710-12, and note; *De Thoren v. Att'y-Gen.*, 17 id. 72, 75, 77, 80.

TAYLOR, J. The learned counsel for the plaintiff and respondent insists that she was entitled to recover upon either of two theories: *First*, that if she was the lawful wife of William Jones at the time she married Lewis Williams, Sr., she was afterward lawfully divorced from said Jones about two years and nine months before the death of Lewis Williams, Sr., and as during all that time she and the said Williams lived and cohabited together as husband and wife, and she was all that time spoken of by the said Williams as his wife and treated by him as such, and during all that time she spoke of said Williams as her husband and treated him as such, from the evidence in the case upon that point, if necessary to sustain the plaintiff's claim that she was the widow of said Williams, the jury would be justified in finding a marriage in fact between the said Lewis Williams, Sr., and the plaintiff after her divorce from the said Jones. *Second*, that there was sufficient evidence in the case to justify the jury in finding that she never was the lawful wife of William Jones, for the reason that he had a wife living at the time she was married to him; and that such wife is still living and not divorced, and that consequently her formal marriage with the deceased, Lewis Williams, Sr., on the 9th of May, 1870, was in every respect a lawful marriage.

The learned counsel for the appellant insists: *First*, that the judgment record in the divorce suit between Jones and Jones, given in evidence, and entered some time in November, 1870, is conclusive evidence against the plaintiff that at the time of the entry of such judgment, and from the date of her alleged marriage with the said Williams in 1870, to the time of the entry of such judgment, she was the lawful wife of said William Jones; and that as a consequence, her marriage with said Lewis Williams, Sr., on the 9th of May, 1870, was absolutely void. *Second*, that there was not sufficient evidence of an actual marriage between the plaintiff and the said Lewis Williams, Sr., deceased, subsequent to the date of the judgment in said divorce suit, and consequently she had failed to prove that she was the widow of the said deceased. *Third*, that the court erred in refusing to give to the jury the following instructions asked by the defendant:

“Testimony has been admitted of acts and conversations of Lewis Williams, Sr., by which he recognized the plaintiff as his wife. This testimony was admitted as being competent, and as tending to show that the parties were married. If you find that such acts of *Jane Williams* and Lewis Williams, Sr., which have been given in evidence, *arose from and were the result of a marriage ceremony which took place between the plaintiff and Lewis Williams, Sr., in May, 1870*, and that *Jane Williams* was then the wife of William Jones, and that no marriage was ever solemnized between the plaintiff and Lewis Williams, Sr., after the divorce was granted to the plaintiff in November, 1870, from said William Jones, then your verdict must be for the defendant.

“If you find that Lewis Williams, Sr., spoke of the plaintiff and introduced her as his wife because of some pretended marriage between the plaintiff and himself at a time when the plaintiff was the wife of William Jones, *and not because of any actual marriage solemnized or contracted after November, 1870*, then your verdict must be for the defendant.

“If you find that no legal marriage was ever solemnized or contracted between *Jane Williams*, the plaintiff, and Lewis Williams, Sr., then all evidence of acts and declarations on the part of Lewis Williams, Sr., are unavailing, and the defendant is entitled to your verdict.”

The fact that the first point made by the learned counsel for the appellant is one of such grave importance to the public, and so far-

reaching in its effects upon the rights of persons not parties to the action for divorce, if sustained to the extent claimed by the learned counsel, and the want of time necessary to enable each member of the court to make a thorough examination of the subject for himself, and the further reason that we are all agreed that the judgment must be reversed for the refusal of the court to instruct the jury as requested by the counsel for the defendant, has induced us to leave that question undecided.

That the instructions which are above set forth, and which were requested by the defendant's counsel, or some instructions equivalent thereto, should have been given to the jury, is apparent upon the evidence in the case. The plaintiff had proved a marriage solemnized between herself and the deceased at a time when the jury, from the evidence given on the trial, might have found that she was the wife of said William Jones. It is admitted by the learned counsel for the plaintiff that it was necessary for her to show, by sufficient affirmative proof, that a lawful marriage in fact existed between her and the deceased at the time of his death. There was no pretense that there was any direct proof of any such lawful marriage, unless the marriage on the 9th of May was a lawful marriage; and it is admitted by both parties that such marriage was void, if at that time the plaintiff had another husband living. The evidence also showed that the cohabitation, acts and declarations of the parties as to their being married and their living together as husband and wife, commenced at the date of such marriage in May, 1870.

The authorities hold, and this court is not inclined to hold otherwise, that in an action for dower the plaintiff is not required to make proof of the actual solemnization of marriage between the plaintiff and the deceased, in whose estate she claims dower; but they also hold that the evidence must be sufficient to establish the fact of a lawful marriage between them. None of the cases hold that living and cohabiting together as husband and wife, or even the declarations of the parties that they are husband and wife, constitute a marriage in fact; or that such acts and declarations are a substitute for the marriage contract; the extent to which the authorities go is, that such evidence may be sufficient to prove a lawful marriage in fact.

The law of this State declares that marriage is a civil contract (see § 2328, R. S. 1878); and there is no statute law which points

out in what manner the contract must be entered into to render it valid. It need not be in writing or in the presence of witnesses, but there must be an agreement between the parties that they will hold toward each other the relation of husband and wife, with all the responsibilities and duties which the law attaches to such relation, otherwise there can be no lawful marriage.

It would seem to follow, therefore, that every lawful marriage must have been entered into by the parties at some particular date or time, and that it cannot in any case be the simple result of cohabitation or the continued conduct of the parties, which ordinarily accompany the married state. As a general rule, when a marriage is sought to be proved by conduct, cohabitation and repute, the date of the marriage in fact, which such conduct and repute tends to establish, is the date of the commencement of such conduct and repute, and not afterward.

It follows, therefore, that when the evidence shows, that at the time of the commencement of the cohabitation and conduct from which it is sought to prove a marriage in fact, there was in fact no such marriage, the mere continuance of such cohabitation and conduct, without something more to indicate that there had been a change in the relations of the parties to each other, would not be sufficient to show a marriage in fact subsequent to the commencement of such cohabitation and conduct.

In the case at bar, if the jury had found that the marriage of the parties on May 9, 1870, was void because of the fact that the plaintiff had another husband then living, and if they had also found that all the acts, conduct and declarations of the parties after the date of the divorce of the plaintiff from such former husband, "arose from and were the result of such void ceremony," such finding, we think, would have negatived the inference of any marriage in fact between the parties subsequent to such divorce, and as a consequence, have defeated the plaintiff's recovery.

The same consequences would have resulted from a finding that all the acts, conduct and declarations of Lewis Williams, Sr., were in consequence of a marriage with the plaintiff when she was the wife of another, and not in consequence of any marriage with her after her divorce from such husband; because such finding would necessarily have negatived any inference that he had contracted any marriage in fact with the plaintiff after such divorce. However ignorant Lewis Williams, Sr., may have been of the fact that

the plaintiff had another husband living at the time he married her, such marriage was absolutely void as to him, notwithstanding his ignorance and good faith; and he could only make her his lawful wife by some marriage in fact, after the divorce of her former husband.

We are of the opinion, also, that the third instruction requested should have been given, and that the general charge did not cure the error of the refusal. It would seem, from the very nature of the matter in issue, that if the jury found that no marriage was in fact ever solemnized or contracted between the plaintiff and the deceased, all the acts and declarations of the parties were of no avail. The only object in proving the acts and declarations of the parties was to establish the fact that a marriage was contracted between them; and if the jury found, as a matter of fact, that no marriage was in fact contracted, then all the other matters introduced into the case were of no consequence.

The only instructions given to the jury on the subject of what evidence was necessary to establish a marriage between the parties were the following. At the request of the plaintiff the court gave this instruction: "In an action by a widow to recover dower in the lands of her deceased husband, it is not necessary for her to make strict proof of marriage; but proof by cohabitation as husband and wife, acts and declarations of the husband recognizing her as his wife, and conduct of the parties, may be sufficient." In the general charge, the court upon this subject said: "And you will determine from a preponderance of the testimony, whether the plaintiff was the lawful wife of Lewis Williams, Sr., and is his widow." The court also charged the jury that, if they found that the plaintiff had another husband living at the time of her marriage to Williams, on the 9th of May, 1870, then such marriage was void, and she did not thereby become the wife of said Williams; but he did not instruct the jury that if such marriage of the 9th of May, 1870, was void, she could not recover in the action.

The case was submitted to the jury upon the issue as to whether there had been a marriage in fact between the plaintiff and the deceased, after the plaintiff had obtained a divorce from William Jones, upon the theory that it was entirely immaterial to the determination of that issue, that the cohabitation and living together as husband and wife, upon which the plaintiff relied to establish such marriage, commenced at a time when it was impossible for them to

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contract a lawful marriage. This was undoubtedly an erroneous view of the case.

Courts cannot but look with suspicion upon a claim of marriage founded upon evidence of cohabitation and conduct which is consistent with the fact of actual marriage, where the evidence affirmatively shows that at the time such cohabitation and conduct commenced, there was in fact no marriage, and that such cohabitation and conduct was meretricious and in violation of law. When such fact is shown, the effect of the evidence upon the question of a marriage in fact at the date of the commencement of such unlawful cohabitation and conduct is entirely destroyed ; and in order to establish a marriage subsequent to the commencement of such unlawful and meretricious conduct, by continued cohabitation, conduct, and declarations of the parties, or by reputation, there should be some affirmative evidence showing that the subsequent relations of the parties were changed, and that that which was meretricious and unlawful in its commencement had been rendered lawful.

It would require much less proof to satisfy either a court or jury that there was a marriage in fact between persons in good repute, and as to whom there was no obstacle to marriage, when the proof of marriage depended upon the fact of cohabitation as husband and wife, and the recognition of each other as such, than when it appeared affirmatively that one or both of the parties claiming a marriage, upon like proofs, were at the time of the commencement of the cohabitation incompetent to contract marriage. And this would be especially so, if it were shown that the party claiming such marriage had full knowledge, at the time of the commencement of such cohabitation, that he or she was incompetent to contract a lawful marriage with the other party. The fact appearing that such party unlawfully commenced the cohabitation, would be strong evidence that he or she would not hesitate to continue such unlawful conduct after the disability had been removed. We think the judge of the Circuit Court ought to have called the attention of the jury to this view of the case, and to have at least instructed them, as requested by the counsel for the defendant, that if they found that the plaintiff had another husband living at the time she married the deceased, in May, 1870, they must then inquire whether there was any sufficient evidence in the case, from which they could find a marriage in fact between the parties subsequent to the time of her divorce from such former husband ; and that he should also have instructed them that,

if the continued cohabitation and conduct of the parties, and their declarations as to their being married and being husband and wife, referred to the marriage made in May, 1870, and at a time when they could not lawfully marry, and not to any marriage in fact contracted after the plaintiff's divorce, then they must find that no marriage in fact was proven.

The general rule upon the question of proof of marriage by proof of cohabitation, conduct and declaration of the parties is stated by a learned judge as follows: "The general and ordinary presumption of the law is in favor of innocence, in questions of marriage, and of legitimacy where children are concerned. Cohabitation is presumed to be lawful till the contrary appears. Where, however, the connection between the parties is shown to have had an illicit origin, and to be criminal in its nature, the law raises no presumption of marriage." 2 Kent, 87; *Jackson v. Claw*, 18 John. 346; 2 Greenl. Ev., § 464; *Physick's Estate*, 2 Phila. 278. The presumption against marriage, where the connection between the parties is shown to have been illicit in origin, may, however, be overcome by proofs showing that the original connection has changed in its character, and a subsequent marriage may be established by circumstances, without actual proof of a marriage in fact. The cases cited by the learned counsel for the respondent in their brief in this case fully establish this point. The following cases also illustrate the same subject: *Starr v. Peck*, 1 Hill, 270; *Clayton v. Wardell*, 4 N. Y. 230; *Caujolle v. Ferrie*, 23 id. 90; *O'Gara v. Eisenlehr*, 38 id. 296; *Foster v. Hawley*, 8 Hun, 68. The rule laid down in the last case cited is stated as follows: "A cohabitation illicit in its origin is presumed to be of that character, unless the contrary be proved, and cannot be transformed into matrimony by evidence which falls short of establishing the fact of an actual contract of marriage. Such contract may be proved by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued, and satisfactorily prove that it had been changed into that of actual matrimony by mutual consent."

We are inclined to hold the rule as above stated to be the proper rule, when applied to a case like the one at bar. Where the party claiming a marriage (on the theory that she was lawfully married to William Jones) deliberately entered into a bigamous marriage contract with the deceased, and commenced cohabitation under such contract, if notwithstanding the fact that she knowingly commenced

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cohabiting with the deceased when she was the lawful wife of another, she claims a lawful marriage with such deceased after her divorce, and after she had thereby acquired the right to become his wife, she ought to be required to establish the fact of such subsequent marriage, either by express proof of the contract of marriage, or by circumstances which would clearly exclude the presumption that she continued to live with him under such illegal contract of marriage.

BY THE COURT. — The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

RYAN, C. J., took no part.

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* (46 Wis. 481.)

Contract — illegality — when third party cannot allege.

If A. receives money from B. for the purpose of paying it, to C. upon an agreement between them, he cannot retain it on the ground that the agreement between B. and C. was illegal.*

ACTION for money had and received. The opinion states the case. The defendant had judgment below.

Jenkins, Elliott & Winkler, and D. S. Wegg, for appellant.

Cottrell, Cary & Hanson, for respondent. The contract between the parties was void as against public policy. *Wight v. Rindskopf*, 43 Wis. 344. 2. The contract being illegal, and plaintiff having paid over the \$3,000 in pursuance thereof, he cannot now recover it. *Broom's Leg. Max.* (5th Am. ed.), 482-5, 488-90, 492-6, 498-500; 1 *Story on Cont.* (5th ed.), §§ 760-766; *Normal v. Cole*, 3 Esp. 253; *Simpson v. Bloss*, 7 Taunt. 246; *Fivaz v. Nicholls*, 2 M., Gr. & Scott (52 E. O. L.), 501; *Robeson v. French*, 12 Metc. 24; *Burt v. Place*, 6 Cow. 431; *Perkins v. Savage*, 15 Wend. 412; *Saratoga Co. Bank v. King*, 44 N. Y. 87; *Hegarty v. Shine*, 8 Cent. L. J. 111; *Swartzler v. Gillett*, 2 Pinney, 238; *Mil-*

*See *DeLeon v. Trevino* (49 Tex. 88), 30 Am. Rep. 101, and note.

ler v. Larson, 19 Wis. 463. Where the parties to an action are *in pari delicto*, the court will not lend its aid to either. The criterion is, whether plaintiff can make out his case otherwise than through the medium and by the aid of the illegal transaction to which he is himself a party. *Broom's Leg. Max.* 484; *Simpson v. Bloss* and *Fivuz v. Nicholls*, *supra*; *Mallalieu v. Hodgson*, 16 A. & E. (N.S.) 690; *Way v. Foster*, 1 Allen, 408.

ORTON, J. The circumstances under which the money was paid by the plaintiff to the defendant, a part of which is sought to be recovered in this action, were substantially as follows: Robert Kiewert, a brother of the plaintiff, was under indictment in the Federal court for certain offenses against the revenue laws of the United States, and the defendant informed the plaintiff that O. W. Wight, an attorney at law, offered and agreed to render certain services through the attorneys of the government, by which the sentence of said Robert, in case of his conviction, should be reduced to the least punishment allowed by law for such offenses, in consideration of the sum of three thousand dollars.

In consequence of this representation, and with this understanding, the plaintiff gave and paid to the defendant said sum of three thousand dollars, to be paid to the said Wight for such services; but the defendant paid to the said Wight only one thousand dollars of such sum, and converted the balance to his own use; and it was not true that said Wight had offered and agreed to render such services for the sum of *three* thousand dollars, but in truth and fact he had offered and agreed to render the same for the sum of *one* thousand dollars only, the sum so actually paid to him therefor. This action is brought to recover the two thousand dollars so fraudulently obtained and converted.

It is contended by the learned counsel of the respondent, that the agreement so made between the plaintiff, through the agency of the defendant, and the said Wight for such services, was illegal and void, and that therefore none of the moneys so paid by the plaintiff to the defendant for the purpose of carrying it into execution can be recovered; and the Circuit Court seems to have taken this view of the question, and rendered judgment against the plaintiff, from which this appeal is taken. In any view which can be taken of this case, under the pleadings and the evidence, we think the judgment is erroneous.

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I. If there was any contract in respect to these services of Wight, which would be held illegal or against public policy, and therefore void, it related only to the payment of *one* thousand dollars, and the two thousand dollars sought to be recovered in this action was not within, but entirely outside, of such contract, and even in the absence of any fraud, was paid to the defendant and is held by him without any consideration whatever, and is not affected by the illegality of the contract, and belongs to the plaintiff, and in equity and good conscience ought not to be retained by the defendant, and may be recovered as for money had and received. *Woodward v. Hill*, 6 Wis. 143.

II. The gravamen of this action is the fraud practiced by the defendant in obtaining the two thousand dollars from the plaintiff by falsely representing that this sum was within and a part of the contract with Wight, and that the sum agreed to be paid to Wight, was *three* thousand dollars, when in fact it was only *one* thousand dollars. Where money is so charged to have been obtained by fraudulent representations, the only material questions to be considered are: *First*, Were such representations intentional, material and false? *Second*, Did they produce a false impression upon the mind? *Third*, Were they the inducement of the payment? *Fourth*, Were they relied upon as being true? If these elements are present, they constitute a positive fraud without exception, and the matters to which such fraudulent representations relate, whether legal or illegal, will not lessen the fraud or affect the liability of the guilty party. *Kerr on Fraud and Mistake*, 73; *Smith v. Mariner*, 5 Wis. 551; *Kelley v. Sheldon et al.*, 8 id. 258; *Reynell v. Sprye*, 21 L. J. Ch. 633.

III. If it is found from the evidence that the agreement was, that Wight should render such services so claimed to be improper and against public policy, for the sum of *three* thousand dollars, and the defendant obtained the same from the plaintiff for the purpose of such payment, but actually paid Wight only *one* thousand dollars, and converted the other two thousand dollars to his own use, even then the plaintiff may recover the money so misapplied and converted, and the defendant cannot defend on the ground that the contract for such services was illegal or against public policy. In respect to such a transaction, the defendant was the agent of the plaintiff, and received the money of the plaintiff with specific directions as to its application and payment as such, and cannot be allowed to say, in defense of an action to recover the

moneys so misapplied and converted, in respect to the contract in pursuance of which, or on account of which, he received it, *contra bonos mores*, to exculpate himself from his admitted fraud, and breach of trust.

The maxim, *In pari delicto melior est conditio possidentis*, has application only as between the immediate parties to an illegal contract, and does not govern where the action is brought by one of such parties to recover money received by a third party in respect of his illegal contract. Broom's Legal Maxims, §§ 567-8; *Tenant v. Elliott*, 1 B. & P. 3; *Farmer v. Russell*, id. 296; *Bousfield v. Wilson*, 16 M. & W. 185. Within this principle it has been held that when moneys of the principal are in the hands of an agent, as the proceeds of property sold, with directions of the principal to pay it out for an illegal purpose, and the agent pays out for such purpose only part of such moneys, and converts the balance to his own use, the principal may recover of the agent such unexpended balance (*Bone v. Eckless*, 19 L. J., Exch. 438); and that money bet upon an election, and deposited with a stakeholder, who, after the event of the election is known, has notice not to pay it over to the winner, may be recovered back by the loser. *Hastelow v. Jackson*, 8 B. & C. 221; *M'Allister v. Hoffman*, 16 S. & R. 147. "While the law will not enforce an illegal contract, yet if a servant or agent of another has, in the prosecution of an illegal enterprise for his master, received money or other property belonging to his master, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction." Wood on Master and Servant, § 302; *Anderson v. Moncrieff*, 3 Desauss. 126; *Brooks v. Martin*, 2 Wall. 79; *Gilliam, Ex'r, v. Brown*, 43 Miss. 641. While the money remains in the hands of the agent, notwithstanding such agent may have received it for the purpose of using it or paying it out in pursuance of an illegal contract between his principal and a third person, and has been directed to so use or pay it, there appears to be no reason for making an exception to the law governing the relation between principal and agent, for such a case, which would prevent the principal from countermanding such directions, and revoking the authority of the agent, and recovering the money. The principle recognized by the above authorities has been sanctioned by the court in *Douville v. Merrick*, 25 Wis. 688, and need not be further considered, except to affirm it in this case.

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IV. As to the two thousand dollars never paid out in pursuance of an agreement with Wight, however illegal that agreement may have been, and to the extent of such non-payment, the contract remains *in fieri* and executory, and to that extent may be rescinded, and the money so remaining in the hands of the defendant may be recovered. The law will not lend its aid to enforce an illegal contract while it remains executory, or disturb it after it is fully executed (2 Chitty on Cont. 971; *Miller v. Larson*, 19 Wis. 463); but it will in all cases favor its rescission and abandonment before its execution. 2 Pars. on Cont., § 476. "If an illegal contract be executory, and if the plaintiff dissent from or disavow the contract before its completion, he may, on disaffirmance, recover back money while *in transitu* to the other contracting party, there being in this case a *locus penitentiae*, and the *delictum* being incomplete." *Edgar v. Fowler*, 3 East, 225; *Vischer v. Yates*, 11 Johns. 30; 2 Chitty on Cont. 918.

These principles meet any view of the case which can well be taken, conceding the position of the learned counsel of the respondent, that the contract with Wight was void as against public policy; so that it is unnecessary to express any opinion as to the illegality of such a contract.

On the case made the plaintiff was clearly entitled to a verdict.

BY THE COURT. — The judgment of the Circuit Court is reversed and the cause remanded for a new trial.

Reversed and remanded.

RYAN, C. J., took no part.

HINCKS V. CITY OF MILWAUKEE.

(46 Wis. 559.)

Constitutional law — exemption of city by charter for liability for defective condition of streets.

A provision in a municipal charter, exempting a city from liability for injury to persons or property by work on streets or sidewalks by contractors with the board of public works, in consequence of the condition of such streets or sidewalks, and making such contractors liable therefor, is invalid.

ACTION for personal injury by reason of a defect in a city street. The opinion states the case. The plaintiff had judgment below on demurrer.

D. H. Johnson, city attorney, for appellant.

Murphey, Goodwin & Mitchell, for respondents.

COLE, J. The complaint, in substance, charges that the plaintiff, while driving along Elizabeth street in the city of Milwaukee, in the evening of the 26th of October, 1877, with his wife, in a carriage, without fault or negligence on his part, was, with his wife, thrown from the carriage in which they were riding, and both injured, in consequence of the carriage being upset by a heap of gravel placed in the street. It is alleged that the gravel was deposited in the street by a contractor with the city, who was engaged in constructing a sewer; that the night was dark, and the gravel had been deposited in the street by the agents and servants of the city, negligently and carelessly, and the same was negligently and carelessly left by the city without any guards, light, fence or other sign about the same to warn travellers upon the street of its presence. The contract under which the sewer was constructed is annexed to and made a part of the contract. It contains stipulations requiring the contractor, while in the performance of the work, to put up and maintain, in the night time, such barriers and lights as will effectually prevent the happening of any accident in consequence of the digging up, use or occupying of the street for the purpose of making the improvement. According to the established doctrine of this court, the complaint states an actionable injury, unless the city is exonerated from liability in the premises by virtue of sections 1 and 2, chapter 20 of the charter (see ch. 184, Laws of 1874), which reads as follows:

"SEC. 1. Whenever any injury shall happen to persons or property in the said city of Milwaukee, by reason of any defect or incumbrance of any street, sidewalk, alley or public ground, or from any other cause for which the said city would be liable, and such defect, incumbrance or other cause of such injury shall arise from or be produced by the wrong, default or negligence of any person or corporation, such person or corporation so guilty of such wrong, default or negligence shall be primarily liable for all damages for such injury; and the said city shall not be liable therefor

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until after all legal remedies shall have been exhausted to collect such damages from such person or corporation.

"SEC. 2. The city of Milwaukee shall not be held liable for damages or injuries to persons or property incurred or happening at any place in the said city where work of any kind or nature is being done in or on streets or sidewalks, by contractors under contract with the board of public works, in consequence of the condition of such streets or sidewalks, arising from the doing of such work. But if the contractors doing such work shall fail to keep up sufficient fences or protection guards to prevent damage or injury to persons or property, or shall be guilty of other negligence in doing such work, and if injury to persons or property occur by reason of such default of such contractors, such contractors shall be liable in an action by the person so injured."

By the first section it will be seen, that when the injury happens by reason of any defect or incumbrance in the street produced or caused by the wrong or negligence of any person or corporation, then such person or corporation is primarily liable, the city only being liable to make compensation after all legal remedies have been exhausted to collect the damages of the wrong-doer. We have no doubt of the validity of this provision of the charter; and did it appear that the case came within it, the complaint would surely be defective for not alleging that the remedy against the contractor had been exhausted. For while it may be true that the general rule of law is, that a party injured may, at his election, proceed against any one of several parties chargeable with the wrong, yet where one party is made responsible for the misconduct of another, by reason of some relation he holds to such other party, there would seem to be no injustice in requiring the injured party first to exhaust his remedy against the party really guilty of the misfeasance or default. Especially should this be so in respect to a municipal corporation which is made responsible for the negligent acts of others by virtue of its duty to keep its streets in a reasonably safe condition. But the learned counsel for the plaintiff contends that this section does not apply to a case where the defect or obstruction in the street is produced by a party constructing a sewer, or making some public improvement under a contract with the city; but was intended to include a case where the obstruction was placed in the street by the owners of adjoining lots, while making some improvement for their own convenience or benefit, with which the city had

nothing to do. We are inclined to think that this construction of the section is the proper one, and that it has no application to the case stated in the complaint. True, the language is quite broad; it speaks of a defect or other cause of injury, produced by the wrong, default or negligence "*of any person or corporation.*" But these general words must, we think, be restricted to a case where the party causing the defect holds no contract relation with the city; as where the owner or occupant of the adjoining lot creates the nuisance, as in *Hundhausen v. Bond*, 36 Wis. 30, and where the city would otherwise be primarily liable to make compensation in the absence of such a provision. Consequently, we hold that the complaint does not state a cause of action within the purview of section 1.

The second section undoubtedly extends to the case stated in the complaint, and if valid, entirely exempts the city from all liability for the damages sustained by the plaintiff. That section makes the contractor alone responsible for the injury occasioned by his negligent act. The validity of this provision is challenged by the plaintiff's counsel, who insists that it is an attempt on the part of the legislature to grant a privilege or immunity to the city of Milwaukee against a general rule of law, while all other municipal corporations are left subject to its operation. Such an enactment, he claims, is odious and unjust, and is distinctly condemned by the doctrine of this court in *Durkee v. Janesville*, 28 Wis. 464; s. c. 9 Am. Rep. 500. It seems to us this objection is well taken, and must prevail. In the *Durkee* case, the charter of the city of Janesville declared that no costs should be recovered against the city in any action brought to set aside any tax assessment or tax deed, or to prevent the collection of taxes or assessments. The charter in that particular was held void, both upon principles of constitutional law, and as being in violation of section 9, article I of the bill of rights of our State Constitution. The opinion of Chief Justice DIXON in the case is so clear and exhaustive upon the question, that nothing further need be said upon the subject. The very able city attorney attempted to distinguish this from the *Durkee* case, but failed to do so to our satisfaction. It seems to us that the cases are not distinguishable in principle. If the provision of the charter of Janesville, which exempted the city from the payment of costs in that class of cases, without reference to the merits of the case, was partial, arbitrary and unjust, it seems to us that

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section 2 is of the same character. This court has uniformly held that municipal corporations, as well as towns, were required by statute to keep their streets and sidewalks in a reasonably safe condition for the use of the public, and were responsible in an action for an injury resulting from a failure to perform that duty. Whether that same liability is imposed upon a municipal corporation at common law, is a question we need not consider. In this State the liability has been founded upon statute. And we think the better rule of law is, that where a dangerous obstruction is negligently left in a travelled street, without proper lights or guards, by a contractor under the city who is engaged in constructing a sewer, or making other public improvements, the city is liable to a person injured thereby. Doubtless, it would be competent for the legislature to make the contractor in such a case primarily liable for injuries occasioned by his wrongful acts; but we do not think that the corporation can, by a special act, be exempted from all liability in the premises.

It follows from these views, that section 2, above cited, affords no defense to this action. We think the order of the county court overruling the demurrer to the complaint must be affirmed.

BY THE COURT. — Order affirmed.

RYAN, O. J., took no part.

SNYDER v. VAN DOREN.

(46 Wis. 602.)

Negotiable instruments — immaterial alteration — signing note in blank — addition of other makers and joint words.

A note in blank, signed by one maker for accommodation, with a blank for words making it joint or several, is not rendered void in the hands of a *bona fide* purchaser as to the first maker by the joining of other makers without his knowledge or consent.

ACTION on a note. The opinion states the facts. The plaintiff had judgment below.

H. B. Jackson, for appellant. Any material alteration of a note, whether for the better or for the worse, terminates the liability of

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the maker not consenting to it. *Master v. Miller*, 4 T. R. 320; s. c., 1 Smith's Lead. Cas. (6th Am. ed., pt. 2) 141. Such, for example, is the effect of an alteration in the time of payment, whether it shorten or extend the time. *Smith v. Weld*, 2 Penn. St. 54; *Low v. Merrill*, 1 Pinney, 340. The addition of the name of a third person as maker is such an alteration of the note as will vitiate it. *Gardner v. Walsh*, 5 El. & Bl. 82; s. c., 32 Eng. L. & Eq. 162; *Chappell v. Spencer*, 23 Barb. 584; *McCaughey v. Smith*, 27 N. Y. 41-44, and cases there cited; *Bowers' Adm'r v. Brigg*, 20 Ind. 139; *Bank of Limestone v. Penick*, 5 Mon. 25; Chitty on Bills (ed. of 1854), p. 215; Byles on Bills (Law Lib., 4th series), vol. 46, p. 247; Story on Prom. Notes, § 408 *a*, and note. If after the completion of the note J. D. Van Doren had removed his own name as maker, making the note that of the appellant only, it would hardly be contended that this was not a material alteration. But it is no less an alteration of a note to *add* the name of a joint maker, than to remove one. The utmost extent of authority to bind appellant, vested in any one by his signing the blank note with J. D. Van Doren and intrusting it to him, was to *fill up the ordinary blanks left unfilled*, so as to make it a perfect joint note of the two signers. It is immaterial *when* or *by whom* the alteration was made, provided it was without appellant's consent. "A material alteration in commercial paper destroys the non-consenting party's liability, although the alteration was made before the paper came into the payee's hands, and was not known to him." 2 Pars. on Cont. (6th ed.) 716; *Wood v. Steele*, 6 Wall. 81, 83; *Holland v. Hatch*, 11 Ind. 497; *Schwalm v. McIntyre*, 17 Wis. 232; *Rounsavell v. Pease*, 45 id. 506.

Finch & Barber, for respondent.

TAYLOR, J. This action is brought to recover the amount of a promissory note bearing date June 5, 1875, payable to the plaintiff or bearer, two years after date, with interest at ten per cent per annum. The note on its face purports to be signed by all the defendants in the following order:

A. J. VAN DOREN,
J. D. VAN DOREN,
L. O. VAN DOREN.

The note is the joint note of the makers.

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The evidence shows that the appellant, I. O. Van Doren, and J. D. Van Doren, signed the note in blank something over a year before the date of the same. The note when signed by the appellant was a printed form, blank as to date, amount, time of payment, rate of interest and payee, and there was also a blank to be filled for the purpose of making it a joint or several note. The evidence also shows that the note was so signed in blank by the appellant for the purpose of enabling J. D. Van Doren to raise money on the same for his own use, and that the appellant was simply an accommodation maker. It also shows that before the note was negotiated or delivered to the plaintiff it was filled up and signed as it appeared at the trial; and for the purposes of this case it must be held that the plaintiff knew that the name of A. J. Van Doren was not signed to the note at the time it was signed by the appellant and J. D. Van Doren. The evidence also shows that there was no express authority given by the appellant that the note might be so signed before the same was negotiated.

Upon this evidence the learned counsel for the appellant insists that there can be no recovery against the appellant. Counsel admits that by signing the note in blank for the accommodation of J. D. Van Doren the appellant authorized him to add the date, amount, time of payment, rate of interest and name of payee, to make it a joint and several or joint or several note, and to make it negotiable or otherwise; but denies that by so doing he authorized him to procure any third person or persons to sign the same as joint or several makers with him.

The real question to be determined in this case is, whether a person who signs a note in blank as maker, for the accommodation of the person to whom he delivers it, must be held, as between him and a *bona fide* holder for value, to have impliedly authorized the person to whom the same is delivered to have the same signed by another party or parties as joint makers with him. We think, both upon principle and authority, that the person for whose accommodation such note is signed may, before the same is negotiated by him, procure the same to be so signed by another person or persons, without vitiating such note in the hands of a *bona fide* holder. If the party signing the note in blank expressly stipulates that the same shall not be signed by any other person, there is probably no doubt but that the note would be void in the hands of any one who took the same so signed by another, knowing that the

accommodation maker had expressly stipulated against such further signature.

We think the rule is, that a party who signs a note in blank makes the person to whom it is delivered for negotiation his agent, not only for the purpose of filling the blanks in the note, but to do any other thing necessary to make the note so signed accomplish the purpose for which it was intended, with the limitation that he shall not insert in such note any contract or stipulation not usually found in a promissory note. It was not even argued by the learned counsel for the appellant that in such case the party holding the note could not, for the purpose of negotiating the same, have it indorsed by a third person or persons, or have a third person guaranty the payment of the same by a written guaranty on the back thereof; and it seems to us that if he may do that there is no objection to his accomplishing the same purpose by having such third person sign the same as a joint or several maker.

It is not a question of alteration of the note, but a question of implied agency on the part of the holder. The note in the hands of the holder, before negotiation by him, is not a binding contract between him and the accommodation maker. To have any validity as a contract, it must be negotiated by the holder; and until such negotiation takes place, the contract is imperfect, and may be filled up and perfected in any manner, by such holder, which is not inconsistent with the implied agency given by the accommodation maker. There can be no doubt that the holder might fill up the same with an amount, date and time of payment, and then alter the same in either of these respects before he negotiated the same, without vitiating the note in the hands of a *bona fide* holder. The person to whom the same was delivered in blank being agent of the maker for the purposes above specified, any alteration made by him in that respect, before negotiation, would no more affect the validity of the note than if made by the maker himself. Chitty on Bills of Exchange, 215. The cases cited below show the extent of the implied agency of the party to whom a bill of exchange or promissory note signed in blank, is delivered. There are two classes of cases illustrative of the subject. First, the cases in which a party writes his name on a piece of blank paper, and delivers it to another person with intent that such other person may use such name as the drawer of a bill of exchange or maker of a promissory note, or where the name is so written as to indicate that the writer is to be the indorser of

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a promissory note or the acceptor of a bill of exchange, and with the understanding that a promissory note or bill of exchange may be written on such blank paper. In such cases, the courts hold that a note or bill of exchange, for any amount, in favor of any person, and payable at any time, may be written over such name, and when negotiated, a *bona fide* holder may recover on the same; and that in such case it is no defense that the party to whom the same was delivered in blank exceeded his actual authority. The same rule applies in the case of a person signing as an indorser or acceptor. In the case of *Russel v. Langstaffe*, 2 Doug. 514, Lord MANSFIELD says: "The indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said, 'Trust Gally to any amount, and I will be his security.' It does not lie in his mouth to say the indorsements were not regular." In the case of *Violett v. Patton*, 5 Cr. 142, which was the case of an indorsement upon a blank piece of paper, Chief Justice MARSHALL says: "The objection certainly comes with a very bad grace from the mouth of Violett. He indorsed the paper with the intent that the promissory note should be written on the other side; and that he should be considered as the indorser of the note. It was the shape he intended to give the transaction; and he is now concluded from saying or proving that it was not filled up when he indorsed it. It would be to protect himself from the effect of his promise by alleging a fraudulent combination between himself and another to obtain money for that other from a third person."

The case of *Putnam v. Sullivan*, 4 Mass. 45, was a case of indorsements made upon blank paper with intent that they should be used by the person with whom they were left, in a certain specified way, and a third person, by fraudulent representations, procured some of these blank indorsements from the person in whose custody they were left, and wrote his own promissory note, payable to a third person, on the blank paper, and negotiated such notes, with such blank indorsements on the back of the same; and it was held that the holders who purchased the same for value could recover on the same against the indorsers. See also *Collis v. Emett*, 1 H. Bl. 313. Daniel on Negotiable Instruments, § 142, speaking of such signatures in blank, says: "It is a settled principle of commercial law, that when such instruments are afterward completed by the holder of such blanks, to whom they are loaned, such parties become as absolutely bound as if they had signed them after

their terms were written out ; and further, that the presence of their names upon blanks purports an authority granted to the holder to fill them for any sum, and with any terms as to time, place and conditions of payment ; and that although the party may prescribe limits to the holder, a *bona fide* transferee from him, ignorant of such limitation of authority, when he takes an instrument which has exceeded it, may recover upon it."

Story on Bills, § 222, lays down the same rule. The law, as declared in the foregoing cases, was commented upon and approved by this court in *Walker v. Egbert*, 29 Wis. 194 ; s. c., 9 Am. Rep. 548.

The second class of cases are those in which the party sought to be charged as maker, indorser or acceptor, signs or indorses a note or bill of exchange in blank, either written or printed, but not filled up so as to make it a perfect note or bill at the time it is so signed. In these cases, the same rule as above stated is applicable, with perhaps the limitation that no material alteration can be made in those parts of the note or bill which were printed or written thereon at the time it was signed or indorsed in blank. In cases of this kind, the rule as to the extent of the implied agency of the person to whom the same is delivered in blank is very clearly and briefly stated in *Bank v. Neal*, 22 How. 107, as follows : "When a party to a negotiable instrument intrusts it to the custody of another, with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument ; and as between such party and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such instrument to his custody ; or in other words, it is the act of the principal, and he is bound by it." The same rule has been laid down in nearly every case in which the question has been raised. *Mitchell v. Culver*, 7 Cow. 336 ; *Bank v. Kimball*, 10 Cush. 373 ; *Montague v. Perkins*, 22 Eng. L. & Eq. 516 ; *Davidson v. Lanier*, 4 Wall. 457 ; *Orrick v. Colston*, 7 Gratt. 189 ; *Schultz v. Astley*, 29 Eng. C. L. 414 ; *Schryver v. Hawkes*, 22 Ohio St. 308 ; *Redlich v. Doll*, 54 N. Y. 238 ; s. c., 13 Am. Rep. 573 ; *Cruchley v. Clarence*, 2 M. & S. 90 ; *Crutchly v. Mann*, 5 Taunt. 529 ; *Ives v. Bank*, 2 Allen, 236 ; *Insurance Co. v. Leavenworth*, 30 Vt. 11 ; *Douglass v. Scott*, 8 Leigh,

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43 ; *Elliott v. Chestnut*, 30 Md. 562 ; *Brummel v. Enders*, 18 Gratt. 897 ; *Bell v. Bank*, 7 Blackf. 458 ; *Holland v. Hatch*, 11 Ind. 500, 501 ; Dan. on Neg. Inst., §§ 143, 144 ; Story on Bills of Exchange, § 222, and notes.

These cases, and many more which might be cited, fully establish the rule as above stated ; and they all hold that the implied agency of the person to whom the note or bill signed in blank is delivered, is of the most general and absolute nature, and that he may bind such signer to any extent, so long as he does not change the nature of the instrument indicated by the blank so signed, or erase or change the parts of the instrument which were written or printed at the time of such signing. In the great number of cases to be found in the books upon the subject, I have been unable to find one which presents the exact point made in the case at bar, and but one where a similar question was determined, and that, we think, is conclusive against the position taken by the appellant in this. In the case of *Schultz v. Astley*, 29 Eng. C. L. 375, it was held by the Common Pleas, TINDAL, Chief Justice, delivering the opinion, that when the defendant wrote an acceptance on a blank piece of stamped paper, and delivered the same to H. to raise money for the use of the acceptor, and a bill of exchange was afterward drawn upon such blank by C., a stranger to H., as drawer, and indorsed by C., the defendant was liable to a *bona fide* holder of the bill for the amount of the same. In the statement of the case it is said, "that it was objected that the bills purporting to be drawn by C., having been drawn by a stranger to the acceptor, after the acceptor's and drawer's name had been written in blank, were not drawn according to the custom of merchants, and were therefore void." I do not think, however, that the evidence showed that any other name than C.'s had ever been written on the bill as acceptor.

Chief Justice TINDAL, in passing upon this objection, says : "The second ground of nonsuit rests upon the invalidity of the two bills of exchange. As to the bill drawn by Clissold, the objection is, that admitting a party must be bound by his acceptance written on a blank piece of stamped paper to the extent of such sum as the stamp will cover, yet that this giving of a blank acceptance authorizes only the party to whom it is given to draw the bill ; or at all events. does not authorize Clissold, a stranger, to sign his name on the same blank piece of paper as drawer, the bill itself

being subsequently written upon the paper by some other person. No authority has been cited to us for any such restriction of the general doctrine above admitted; nor can we see any distinction in principle, when the bill has passed into the hands of third persons, between holding the acceptor liable to a given amount, when the bill is afterward drawn in the name of the party who has obtained the acceptance, and when it is drawn by a stranger who becomes the drawer at the instance of the party to whom the acceptance is given. The blank acceptance is an acceptance of the bill which is afterward put upon it; and it seems to follow from the doctrine of Lord MANSFIELD in *Russel v. Langstaffe*, 2 Doug. 514, that it does not lie in the mouth of the acceptor to say that the drawing or indorsing of the bill was irregular. The acceptor was a stranger to the party to whom he handed over his blank acceptance, and as all that he desired was to raise the money, it could make no difference to him, either as to the extent of his liability or in any other respect, whether the bill was drawn in the name of one person or another."

The cases cited by the learned counsel for the appellant do not conflict with the rule as above stated. They are all cases in which the note or contract was perfect when the signature of the party objecting to its validity was affixed thereto, except the case of *Holland v. Hatch*, 11 Ind. 497; and in that case there was a stipulation inserted in the note, signed in blank, which was not usual, and was outside of the ordinary obligations contained in such instruments. In none of these cases, except the one in Indiana, was there any question as to the extent of the power of the party for whose benefit a note or bill of exchange was executed in blank, to fill up the blanks or alter the same before negotiation. They all present the simple case of a party who had placed his name to a perfect contract in all its parts, and who consequently placed no trust in and gave no agency to the party holding his signature to such contract, to shape or perfect the same for him. At the time he gave his signature, he is supposed to have understood the exact contract he signed, and by which he was to be bound, and there was therefore neither an express nor an implied agency given to the party to whom such contract was delivered, to alter or change the same. In the case of *Holland v. Hatch*, *supra*, the court recognized the doctrine of the cases above cited, but held the party who executed the note in blank not bound, because the party to whom

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the same was delivered added to the note, when filled up, a clause waiving the appraisement laws. In the opinion, the court says: "The legal effect of the instrument, as signed by the defendant, was to permit the holder to fill up all the blanks as to sums, times of payment, payees, etc., as he might choose, and make the bills complete; but more than this neither Tyner nor any one else had the right to do; and we think the insertion of the clauses waiving the appraisement laws, either by Tyner or any other holder, so essentially changes the character of the bills as to render them void." In this case the holders knew that the bills were signed by the defendant in blank, and that the blanks, when so signed, did not contain the clause waiving the appraisement laws. Had the bills been filled up, and the appraisement clause inserted, by the person to whom the blanks were delivered, before he negotiated them, and had he then negotiated them to a *bona fide* holder for value, having no knowledge that the defendant had executed them in blank, the decision would probably have been the other way. See *Putnam v. Sullivan*, 4 Mass. 45, and *Schryver v. Hawkes*, 22 Ohio St. 308. The decision in 11 Indiana simply holds, that a party who executes a note or bill in blank does not thereby authorize the person to whom he delivers the same to insert any stipulations or clauses therein not necessary to perfect the note or bill, or which are not usually inserted in such instruments.

We can see no reason why a party who signs his name to a blank note or bill, and delivers the same to a third person, for the purpose of enabling such person to raise money thereon for his own use, should be heard to object to the payment of such note or bill, because it is afterward, and before the same is negotiated, signed by another person or persons. By his signature he is, in law, presumed to have intended to hold himself bound to any person who might thereafter receive the same for value, for any sum, payable at any time and place, and to any person or persons, at the discretion of the party to whom he delivers the same for negotiation. In the language of Chief Justice TINDAL, above quoted: "It can make no difference to him, either as to the extent of his liability, or in any other respect, whether the bill or note be signed by another person or not." He certainly cannot be injured thereby. As he has given the credit of his name for the purpose of enabling the person to whom he gives it to raise money upon the instrument to which it is affixed, he must be held to have authorized such person to make

use of the same in any way which may be reasonably necessary to accomplish the purpose for which it was given, with the limitations above noticed, that he shall not change the nature of the contract he has signed, nor increase the liability which in law he has assumed by such signature. All the cases hold that a note signed in blank may be filled up with the name of any person as payee, and may be made payable to order or bearer, and consequently may be indorsed by the person to whose order it is made payable, either at or before its negotiation; and if the holder may make the instrument available for the purpose for which it is given, by procuring the indorsement of a third person, which will give the instrument greater credit, there does not seem to be any good reason why such greater credit may not be given to it by adding the name of another maker. It does not seem to us that the law will permit this defendant, who has voluntarily signed the note in controversy, and voluntarily made himself liable to the holder for the full amount thereof, to say that he will not pay the same because some other person has also bound himself for its payment.

This case does not raise the question as to what might be the effect of procuring an additional accommodation maker to a note which had been signed in blank, at the same time, or by mutual agreement, by two or more joint accommodation makers, who, in case of payment by one or more of them, would be liable to contribution as between themselves; and this decision is limited by the facts to the case of a single accommodation maker signing alone, without any express agreement that the same shall be signed by any other; and in such case we hold that, unless expressly prohibited by the person signing as such maker, the holder to whom the same is delivered may, before negotiation, procure the same to be signed by another accommodation maker, or makers, without vitiating the note or bill, and that the same may be enforced by a *bona fide* holder for value, even though he knew that the same had been so signed in blank by the party against whom he seeks to enforce the same. Mere knowledge of the fact that the bill was signed in blank by the defendant will not defeat a recovery on the same, even when the person to whom the same was delivered has exceeded his authority or appropriated the note or bill to a purpose for which it was not intended. To defeat a recovery in case of misappropriation or excess of authority expressly given, knowledge of such misappropriation, or the limited authority, must be brought home to the holder who

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seeks to recover on the same. Story on Bills of Exchange, § 222, and notes; Dan. on Neg. Inst., § 143, and notes.

In view of the above opinion as to the liability of the appellant upon the note upon which this action was brought, there was no litigated fact to submit to the jury, and therefore no right on the part of the defendant to demand a special verdict; and the court was clearly right, therefore, in directing a verdict in favor of the plaintiff for the amount of the note and interest. *Furlong v. Garrett*, 44 Wis. 111-125.

BY THE COURT.—The judgment of the Circuit Court is affirmed.

READY V. HUEBNER.

(46 Wis. 792.)

Usury is a personal defense.

Usury cannot be pleaded by a second mortgagee in an action to foreclose a prior mortgage on the same premises.*

FORECLOSURE. The opinion states the point. The plaintiff had judgment.

White & Forrest, for appellants.

Nash & Schmitz, for respondents.

COLE, J. The only question presented on this appeal is, whether in a suit to foreclose a prior mortgage a second mortgagee can set up the defense of usury to avoid such mortgage. The mortgagor makes no defense. And the question is, whether the defense of usury is so exclusively personal that it cannot be made by the second mortgagee. We are not aware that this precise question has been before presented to this court for decision, though in *Bensley v. Homier*, 42 Wis. 631, a strictly analogous one was passed upon. That was an action to foreclose a mortgage which the mortgagor did not defend. A junior judgment creditor of the mortgagor attempted to avail himself of the defense of usury to defeat the mortgage. The alleged usurious contract, in that case as in this, was made under chapter 160, Laws of 1859. The chief justice, in

* See *Lamotte Co. Nat. Bank v. Bingham* (50 Vt. 105) 28 Am. Rep. 490.

a very able and most instructive opinion, announced the decision of the court, holding that the defense of usury was personal to the debtor, his privies in blood or estate, or privies to the contract, and that principle and the weight of authority were against the right of the judgment creditor to set it up as against the mortgage. The chief justice quotes, with approval, a passage from Tyler on Usury, ch. 31, p. 417, in regard to the policy of the statute of usury, where that author says that its object is to protect the borrower against the oppressive exactions of the lender, and that it is not essential to the complete promotion of that object, that other persons than the victims of the usurer, or persons standing in legal privity with him, should have the benefit of the defense. Now it seems to us that this case falls fully within the doctrine of *Bensley v. Homier*. For there is no solid ground that we can see for a distinction in principle between that case and this. If a junior judgment creditor of the mortgagor stands in no such relation to the original transaction as to have the benefit of the defense, it is difficult to assign a reason which would give a second mortgagee that right. If one cannot attack the prior mortgage for usury, why should the other be permitted to do it?

The counsel for the defendant insists that a distinction exists between the cases, growing out of the different manner in which the subsequent lien is created or arises. In the case of the mortgage it is created by contract with the borrower, while in the case of the judgment creditor it arises by operation of law, without the act of the borrower, and in spite of him. But we do not see that this fact should change the case, or affect the principle upon which the *Bensley* case rests. That decision goes upon the ground that the defense of usury is a personal one; that no one but the party to the usurious loan, his heirs, devisees or personal representatives, can avoid the contract on account of usury; that a party who is a stranger to the usurious transaction cannot avoid the usurious lien. It is true, there is a class of cases which hold that the purchaser generally — not of the mere equity of redemption — of property charged with an usurious lien or claim, can allege the usury and defeat the claim when the conveyance shows that the vendor conveyed the property discharged of such lien. *Newman v. Kershaw*, 10 Wis. 333; *Ludington v. Harris*, 21 id. 240; *Hartley v. Harrison*, 24 N. Y. 176; *Bullard v. Raynor*, 30 id. 197. See *Chamberlain v. Dempsey*, 36 N. Y. 144-149; *Williams v. Till*, id.,

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319. The reason given in some of these cases for such a ruling is, that the purchaser, under such circumstances, succeeds to all the relations of his vendor in respect to the property, and therefore necessarily acquires the right to question the validity of the usurious security in protection of his title. But whether these decisions rest upon sound principle, and can be reconciled with the well established rule that usury is a personal defense which cannot be set up by a stranger to the original transaction, we shall not now stop to inquire. It is sufficient, for the disposition of this case, to say that it falls fully within the doctrine of *Bensley v. Homier*, which we think lays down the correct rule as to who is entitled to set up the defense of usury to avoid a prior lien. It follows from these views that the judgment of the Circuit Court must be affirmed.

BY THE COURT.— Judgment affirmed.

TAYLOR, J., took no part.

REDMAN V. HARTFORD FIRE INSURANCE COMPANY.

(47 Wis. 89.)

Insurance — warranty — construction of.

An application for fire insurance contained a statement that "the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk, and the same is hereby made a condition of the insurance and a warranty on the part of the assured;" and the policy made the application a part of it and a warranty. *Held*, that the warranty was only such as was described in the application, and embraced only such statements as were material to the risk and known to the insured to be false.*

ACTION on a policy of fire insurance. The application contained the following stipulation: "And the said applicant hereby covenants and agrees to and with said company, that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the

*To same effect *Fitch v. Am. Pop. L. Ins. Co.* (59 N. Y. 557), 17 Am. Rep. 322.

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applicant and are material to the risk, and the same is hereby made a condition of the insurance, and a warranty on the part of the assured." The policy provides that the application "shall be considered a part of this policy, and a warranty by the insured." The opinion states other facts. The defendant had judgment below.

J. S. White and Vilas & Bryant, for appellant.

* *J. W. Lusk and John C. Spooner*, for respondents.

LYON, J. When the case of *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622, was decided, a majority of the members of the court were of the opinion that positive and unqualified statements of the insured, contained in the application for the insurance, in respect to the precautions used against fire, although in the present tense, are, in general, continuing or promissory undertakings, in the nature of express warranties, if made so by the contract; and that a failure by the insured to continue such precautions during the term of the policy is fatal to the contract. A reargument of that case has been ordered, and will probably be had at the next term. We do not wish to decide the question there involved before the case is reargued, and we do not find it necessary to do so on this appeal. For the purposes of this case, it will be assumed that *Blumer v. Ins. Co.* was correctly decided in the first instance, and the case will be considered from that standpoint.

The nonsuit was ordered on the ground that the uncontradicted evidence proved that the contract of insurance had been forfeited, and the insurer released therefrom, for the following reasons and those only. Two of the interrogatories in the application for insurance, and the answers of the plaintiffs thereto, are as follows: "What material is used for lubricating or oiling the bearings or machinery?" Ans. "Lard and sperm oil." "Is the machinery regularly oiled? If so, by whom and how often." Ans. "Yes, by engineer and miller, as often as necessary." The evidence seems to show conclusively that during the whole life of the policy an oil, known as "Fine Engine Oil" was constantly used in the mill for lubricating purposes, and that the machinery was not usually oiled by the engineer or miller, but by another person specially employed by the plaintiffs for that purpose.

The learned Circuit judge held that the answers to the above questions were absolute and continuing undertakings in the nature

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of express warranties, and that the failure by the plaintiffs to use lard and sperm oil, and to have the machinery oiled by the engineer or miller, invalidated the contract of insurance and released the defendant from any and all obligations under it. Hence the nonsuit. This ruling ignored the questions whether the plaintiffs knew that there had been a departure from the requirements of the contract in respect to the oil used for lubricating purposes, or the person who used it, and whether the risk or hazard of fire was thereby increased.

By the terms of the policy the application is made a part of it. The two instruments are therefore parts of the same contract, and must be construed together, as though all of the statements and stipulations contained in each were written in one instrument. Hence the stipulation at the close of the application must be treated as if written in the policy.

It is manifest that such stipulation is not qualified or changed by any thing in the policy. The condition therein that the application shall be considered a warranty by the assured means just such a warranty as is stipulated in the application — no more and no less. Where this doubtful, the fact, that the application came under the immediate scrutiny of the assured while negotiations for the insurance were pending, and the policy did not, would resolve the doubt by making the stipulation in the application controlling. Hence the case turns entirely upon the construction of the stipulation in the application.

Counsel for defendant maintain that the first clause of the stipulation, to wit, that "the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured," is not qualified or affected by the next sentence — "so far as the same are known to the applicant, and are material to the risk," — but that such sentence is an additional stipulation that the insured have stated in the application all facts known to them which are material to the risk, although the information is not called for in the interrogatories. If this is the correct construction, the plaintiffs covenanted against both the *suggestio falsi* and the *suppressio veri*, and it would seem to follow that a breach of the covenant in either respect would be fatal to the contract under the last clause of the stipulation, which reads, "and the same is hereby made a condition of the insurance, and a warranty on the part of the

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assured." But the defense does not rest upon any alleged concealment of facts material to the risk and known to the plaintiffs, but upon their false affirmations, or their failure to comply with continuing or promissory undertakings, in respect to the precautions used, or to be used, against loss by fire of the insured property. Hence, the construction contended for would render the words "so far as the same are known to the applicant and are material to the risk" entirely immaterial and inapplicable in the present case.

Omitting these words from the stipulation, there remains a positive unqualified covenant that the statements contained in the application are true. This would make the case substantially like the *Blumer* case, and would sustain the nonsuit on the hypothesis assumed at the outset.

On the other hand, counsel for the plaintiffs maintain that the words "so far as the same are known to the applicant and are material to the risk," contained in the stipulation, qualify and limit the preceding clause, and restrict the condition and warranty thereafter mentioned to such statements in the application as were material to the risk and known to the plaintiffs to have been false. Under this construction the contract cannot be declared void unless it is made to appear not only that the application contains some false statements of fact, but that the insured knew it to be false, and that the same was material to the risk. And as to a promissory or continuing statement or undertaking, true when made, but afterward departed from, it must appear that the change increased the risk or hazard of loss, or it is immaterial.

It seems obvious that one of the constructions contended for must be adopted, and the question is, which of the two is the more reasonable and just? In determining this question we shall enter into no minute analysis of the stipulation, nor indulge in any extended discussion. There are a few general considerations which control our judgment, and these will be very briefly noticed.

In the first place, we think there is no authorized rule of construction which will permit us to hold that the stipulation may be extended to facts and circumstances concerning which no interrogatory is propounded in the application. More than one hundred questions are propounded therein to the plaintiffs, calling for most minute information upon every matter which would seem to be of any interest to the insurer, and there is no general interrogatory calling for information in respect to matters not specially inquired

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after. Under these circumstances the plaintiffs might well have believed that every fact which the insurer deemed material to the risk was specially called for, and that the stipulation was only intended to bind them in good faith in their answers to the interrogatories propounded to them. We think any intelligent and prudent business man would have so understood it. The stipulation was framed by the insurer, and had it been intended to require the insured to go beyond the interrogatories and disclose facts not called for therein (if any existed) material to the risk, a general interrogatory calling for such facts would have been inserted; or at least, the stipulation would have been framed to express that intention more clearly. We cannot assume that the insurer would leave its intention in that behalf to rest in uncertain and doubtful inference, when it was so easy to express it clearly and unmistakably. If these views are correct they are fatal to the construction claimed on behalf of the defendant.

Moreover, that construction would work a forfeiture of the contract, and it is a maxim that in a doubtful case the construction should be preferred which will save the contract, rather than one which will destroy it.

The use of the word *warranty* in the stipulation is not very significant; certainly it does not control the construction. There may be a warranty without the use of the word, and its use may not in every case create one. The vendor of a horse who represents to the purchaser that the animal is sound, the purchaser relying upon such representation, warrants the soundness of the horse, although he does not use the word *warrant*. But unless the representation is material, it is no warranty. On the other hand, if the vendor *warrants* the horse sound so far as he knows, that is no warranty in the legal sense of the term, and he can only be held liable for an unsoundness on proof that he knew the fact. That is, he is not liable as a warrantor, but only for his fraudulent and false representation. And here too the representation must be material, that is to say, it must have been an inducement to the contract, or there is no liability. So the stipulation under consideration, notwithstanding the use of the word *warranty*, may, without doing violence to the language employed, be construed as merely an agreement against false and fraudulent material statements in the application. Regarding the statements upon which this case turns as continuing or promissory representations, the same elements of

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knowledge by the plaintiffs that they were false or have been departed from, and of materiality, must be proved to exist, or the contract cannot be held void.

For the reasons above suggested, and because we believe that to be the more natural and reasonable construction of the language employed in the stipulation, we adopt the construction claimed on behalf of the plaintiffs. This is substantially the construction given to a similar clause in a policy in *Houghton v. Ins. Co.*, 8 Metc. 114.

We hold, therefore, that to escape liability on the policy, the defendant must show that the use of "Fine Engine Oil," instead of lard and sperm oil, was known to the plaintiffs, and increased the risk; or that the risk was increased by the fact that some person other than the engineer and miller usually oiled the machinery.

The judgment of nonsuit cannot be sustained unless such conditions of knowledge and materiality were conclusively proved. That they were not, will scarcely be denied. Besides, testimony offered by the plaintiffs to negative the existence of one of these conditions, was rejected. The judgment must be reversed for the following reasons:

1. The testimony tended to prove that the plaintiffs believed that the oil used in their mill for lubricating purposes, although denominated "Fine Engine Oil," was a compound composed mainly of lard and sperm oil. We think the testimony was sufficient to send that question of knowledge to the jury.

2. The court rejected testimony, which, had it been received, might have tended to show that the oil used in the mill during the life of the policy was as good and safe as lard and sperm oil. The evidence should have been received on the question of the materiality of the statement on that subject in the application.

3. There does not appear to be any evidence that the machinery was not properly oiled by the person employed for that purpose. If it was properly oiled, the representation in that behalf, although false, is immaterial. The burden was upon the defendant to show the materiality of the statement, and it failed to do so.

BY THE COURT.—Judgment reversed, and cause remanded for a new trial.

DAYTON V. WALSH.

(47 Wis. 113.)

Marriage — crops raised by husband on wife's land — creditors.

Crops raised on a wife's land by a husband's labor are not liable for his debts, although she bought the land on credit and was engaged in paying for it by the profits of the crops so raised.

ACTION of conversion. The opinion states the facts. The defendant had judgment below.

Baker & Spooner, for appellant.

N. H. & M. E. Clapp, for respondent. That a married woman may acquire a separate estate by purchase, and hold it against her husband's creditors, she must pay for it out of funds derived from some person other than her husband; and if the purchase price is acquired through the husband, as if the property is paid for with the husband's earnings, or with the joint earnings of husband and wife, then, in a contest between her and the husband's creditors, she cannot recover. *Gamber v. Gamber*, 18 Penn. St. 363; *Walker v. Reamy*, 36 id. 410; *Auble v. Mason*, 35 id. 261; *Farrell v. Patterson*, 43 Ill. 52; *Manny v. Rixford*, 44 id. 129; *Carpenter v. Tatro*, 36 Wis. 297. The findings show that plaintiff had no separate estate to invest in the land, and that the whole transaction was really a redemption of the land from mortgages given upon it by the husband, which redemption is to be effected by using proceeds of crops raised on the land under the husband's direction, and by the joint labor of husband and wife. Crops raised under such circumstances must be held, in a contest of this character, to belong to the husband. See, beside the authorities already cited, *Fitzpatrick v. Borbriäge*, 2 Brewst. (Penn.) 559; *Bucherv. Ream*, 68 Penn. St. 421; *Hallowell v. Horter*, 35 id. 379; *Baringer v. Stiver*, 49 id. 129; *Glidden v. Taylor*, 16 Ohio St. 509; *Quidort v. Pergeaux*, 18 N. J. Eq. 472; *Bear v. Hays*, 36 Ill. 280; *Wilson v. Loomis*, 55 id. 352; *Patton v. Gates*, 67 id. 165; *Hume v. Scruggs*, 4 Otto, 22; *Moore v. Jones*, 13 Ala. 296; *Holly v. Flournoy*, 54 id. 99. The notes given by the plaintiff were no part of her separate estate; they were void in law, and could not be made a charge on

any separate estate she might thereafter acquire; and the only remedy of the payees would be to recover the land by foreclosing the mortgages. *Wooster v. Northrup*, 5 Wis. 245; *Brown v. Hermann*, 14 Abb. Pr. 394.

COLE, J. This is a contest between the plaintiff, a married woman, and her husband's creditor, for certain crops grown upon a farm, the title of which is in her. It appears that the plaintiff, having no separate estate, purchased the farm of a third party, paying nothing down, but giving her own note and a mortgage on the premises conveyed, to secure the payment of the purchase-money. There is no claim nor pretense that the purchase by the plaintiff was not a perfectly fair, honest, *bona fide* transaction, free from all imputation of fraud, unless the law condemn such a purchase upon credit. The husband of the plaintiff lives with her on the farm, assumes the direction and control of the business so far as relates to the farm labor, but carries on the business in the name of the plaintiff, as her agent, and without any agreement as to his compensation for services rendered. The plaintiff has paid from the proceeds of the crops raised upon the farm, one year's interest on the purchase-money, and in addition, made a payment of \$200 to apply on the principal; and it is admitted that the crops in question were produced by means of the joint labor and management of the plaintiff and her husband. These are the material facts upon which the question of law arises. Can, then, a married woman, under the laws of this State, who has no separate estate, purchase of a third person, upon credit, a farm; take the title in her own name, and hold it for her own use and not for the use of the husband; carry on the farm by means of the agency of her husband, who is employed by her to manage the business but without any specific agreement as to his compensation; and hold and retain the crops thus raised as her own? Or do the crops under such circumstances become liable for the debts of her husband?

The doctrine is elementary, that at common law a married woman had capacity to take real and personal estate, by grant, gift or other conveyance, from any person other than her husband. Equity sustained conveyances to the wife direct from the husband, where the rights of creditors did not intervene. *Putnam v. Bicknell*, 18 Wis. 333; *Pike v. Miles*, id. 164; *Hannan v. Oxley*, id. 519. As to the real property, at common law, where no trust was created,

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the husband took the rents and profits during coverture, or for life where there was issue of the marriage; while as to the wife's personal property, he became the absolute owner providing he reduced it to possession during coverture. But this rule of the common law in respect to the rights of the husband in the property of the wife was changed by statute more than a quarter of a century ago. See chapter 44, Laws of 1850. By this enactment it was provided, that a married woman might hold as her own separate estate any real or personal property belonging to her at the time of her marriage, and might likewise receive, by inheritance, gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, any real or personal property or interest or estate therein, and the rents, issues and profits thereof, in the same manner and with like effect as if she were unmarried; and the same should not be subject to the disposal of her husband, nor be liable for his debts.

This statute removed many of the disabilities which a married woman was under at the common law, and secured to her the full use and enjoyment of her separate estate. See *Conway v. Smith*, 13 Wis. 125; *Feller v. Alden*, 23 id. 301; *Beard v. Dedolf*, 29 id. 136; *Hoxie v. Price*, 31 id. 82; *Fenelon v. Hogoboom*, id. 172. In *Mc Vey v. Green Bay & Minnesota Railway Co.*, 42 id. 532, we had occasion to put a construction on the word "grant" as used in this statute; and it was decided that it included a deed of bargain and sale to a married woman, executed by a stranger, and that a married woman, under such a conveyance, might acquire title to land by purchase, and hold it as her separate estate, if it really were such. But in that case no question arose as to the power of a married woman, having no separate estate, to purchase on credit, as in this case; because the court held, that in the absence of all proof upon the subject, the presumption was that the consideration was paid by the grantee when the conveyance was executed. Of course, in all cases where the consideration was in fact paid by the wife out of her separate estate, the purchase was good and valid. Notwithstanding the legislature had thus secured to the wife the full use and enjoyment of her separate estate, and clothed her with power to make legal contracts with respect to it, still her earnings belonged to the husband, unless, either from drunkenness, profligacy or other cause, he neglected or refused to provide for her support. *Stinson*

v. *White*, 20 Wis. 562; *Edson v. Hayden*, id. 683. But by chapter 155, Laws of 1872, the individual earnings of a married woman, except those accruing from labor performed for her husband, are declared to be her separate property, and not subject to her husband's control, nor liable for his debts. This being the state of the statutory law, it follows, and has in fact been so ruled, that a married woman may now carry on business in her own name and for her own benefit; may make valid contracts in respect thereto, which may be enforced at law in actions against her; and may enjoy and have the advantage of all the profits arising from such business, in the same manner as though she were sole. *Meyers v. Rahte*, 46 Wis. 655. If she have a separate estate, it would not be claimed that she could not purchase real or personal property, either for cash or on credit, to use in carrying on trade or business, and increase her profits. Nor will it be denied, if she have no such estate, that she might get or acquire property by her labor, skill or talents, and hold and enjoy it as "*earnings*," for so the law declares.

Dr. Webster defines "*earnings*" to be that which is earned; that which is gained or merited by labor, services or performances; wages or reward. We know that some gifted women acquire or earn large sums of money by their writings or works of art, or by singing or performances on the stage. Others, again, make wealth in carrying on trade, or by sagacious and well-directed efforts in some branch of industry. These earnings and profits the law of this State secures to the married woman as her separate property. Now suppose a married woman is a seamstress, having no estate of her own; may she purchase a sewing-machine by means of which she may increase her earnings and make her labor more profitable? Or if she be a music teacher, may she buy a piano-forte upon which she can give music lessons? Does not the law allow her to buy these things on credit, and acquire a separate estate by her earnings? It seems to us it does. It is but another application of the same principle, to permit her to lease or buy a house upon credit, in which she may keep a private school, or earn money in keeping boarders; or to permit her to buy a farm in the same manner, and raise stock or grain, and thus acquire a separate estate. It is in perfect accord with the spirit of all the legislation in regard to the property rights of married women, to enable her to do these things. It is said that these statutes are remedial in their

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character ; intended to remove the disabilities which the common law attached to married women, and were designed to enable them to have, hold and acquire property which they could call their own, and to earn something for themselves by their skill and labor. They are therefore to be liberally construed to secure the object of their enactment. *McVey v. Green Bay & Minn. Railway Co.*, *supra*. There can be no doubt that the title to the farm in this case vested in the plaintiff by the conveyance made to her, the same as though she antecedently had a separate estate with which to pay the consideration. Now may she not hold and enjoy the proceeds of the farm as her own property? Probably, if she had not used the agency of her husband to carry on the farm and aid in raising the crops, it would not be claimed that he had any interest in them which his creditors could seize upon an execution. But if the wife is the real owner of the premises, is there any legal objection to her employing her husband as an agent to manage the business for her? There is doubtless more or less reason to suspect the fairness and honesty of such an arrangement, and it should be closely scrutinized to see that it is not a cover for fraud—a mere device to place the husband's property beyond the reach of creditors. But where the purchase by the wife is really *bona fide*, she being the real owner of the property, we do not think the law imputes fraud or condemns the transaction, from the mere fact that the wife had no separate estate when she made the purchase, and therefore, from necessity, made it wholly on credit.

In *Feller v. Alden*, *supra*, the wife owned land as her separate estate, and cultivated it by means of the agency of her husband and the labor of her minor children. It was held that the legal title to the products and proceeds of the farm was in the married woman, so that they could not be levied on under an execution against her husband. It was said that the wife was at liberty to avail herself of the agency of her husband to manage her separate estate, and still the produce thereof, with the increase of stock, would belong to her. It is suggested on the brief of counsel for defendant, that the doctrine of that case has been overruled by the subsequent decision in *Lyon v. Green Bay & Minn. Railway Co.*, 42 Wis. 548 ; but that is a mistake. The *Lyon* case was an action of trespass by the wife for injuries to the grass and crops on her land. This court thought the evidence showed that the husband received the proceeds of the land, and was the real owner of the crops, and was

the party to bring an action for an injury to them. There is no conflict between the two decisions, as we understand them.

We do not deem it necessary to comment upon the decisions in other States, to which we were cited on the argument, many of which were made under statutes unlike our own.

The question presented is purely one arising upon our own statute, and we feel at liberty to give it that construction which will best meet the object of the legislature in enacting it.

It follows from these views, that the judgment of the Circuit Court must be reversed, and the cause must be remanded with directions to give judgment for the plaintiff for the return of the property or its value.

BY THE COURT. — So ordered.

INGRAM V. RANKIN.

(47 Wis. 406.)

Damages — measure — for conversion or breach of contract to sell goods.

In an action for conversion or breach of contract to deliver goods, unless the plaintiff has been deprived of some special use of the goods, anticipated by the defendants, or is entitled to exemplary damages, the measure of damages is the value of the goods at the time and place of conversion or when and where delivery was due, with interest to the time of trial.

ACTION for value of hay, wheat and oats alleged to have been wrongfully converted. The opinion states the point. The plaintiff had judgment below.

Coleman & Spence, and C. A. Eldredge, for appellants.

Edward S. Bragg, for respondent.

TAYLOR, J. The appellants assign as errors, that the Circuit judge erroneously instructed the jury as to the measure of damages the plaintiff was entitled to recover, and erred in instructing the jury, in substance, that the written lease under which the plaintiff asserted his right to the possession of the land, upon which the grain and hay in controversy were raised, was valid and not impeachable for fraud.

[Omitting the latter.]

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Upon the question of damages, the court instructed the jury as follows : " Testimony has been given in respect to the value of this property; not the value of the property at the time it was taken, but the highest value of this property at any time since the property was taken, to the present time. If the plaintiff be entitled to recover he is entitled to recover the highest value of the property within that period of time, from the time it was taken to the present time." To this instruction the defendants duly excepted.

After a careful consideration of the decisions of this court upon the question as to the rule of damages in actions of this kind, and an examination of a large number of cases decided by the courts of other States in this country, and by the courts of England, we are satisfied that the rule, as laid down by the learned Circuit judge, is not sustained by the weight of authority, and that it ought not to be adopted by this court upon principle. We think the rule adopted by the Circuit Court would in many cases work great injustice, and violate the rule that compensation for the plaintiff's loss is the true rule of damages in all cases in which he is not entitled to exemplary damages.

As it is urged by the learned counsel for the respondent that the Circuit judge was constrained to give this instruction as to the measure of damages, upon the authority of the decisions of this court, it is but just that a full examination of the cases in this court should be had. As this court is now constituted, we would hesitate to set aside a rule of law which can fairly be said to have received the deliberate sanction of the court, in a case or series of cases calling for the settlement of such rule of law.

The first rule laid down by this court as to the measure of damages, and which is sustained by a large number of cases, is that the damages for which the plaintiff may recover must be the legal, natural and proximate consequences of the act complained of; and this rule is equally applied to actions for the breach of contract and for torts. *Vedder v. Hildreth*, 2 Wis. 427; *Brayton v. Chase*, 3 id. 456; *Bradley v. Denton*, id. 557; *Gordon v. Brewster*, 7 id. 355; *Oleson v. Brown*, 41 id. 413; *Stewart v. City of Ripon*, 38 id. 584. This rule is so well settled, both in this and all other courts, that it is unnecessary to cite other cases to sustain the same. This rule is only qualified, in this court, where the act complained of is of such a nature as to entitle the plaintiff to recover exemplary or punitive damages, in addition to compensatory damages.

It is unnecessary to cite cases either in this or other courts to sustain the universal rule of law, that the plaintiff is entitled to recover only compensatory damages, except in the cases above stated, when, under the decisions of this and some other very respectable courts, the plaintiff may recover exemplary or punitive damages.

The great controversy in the decisions and in the courts is as to what are and what are not compensatory damages, all the courts holding to the rule that compensation is the true measure of the damages to be recovered, except where exemplary damages are allowed; and, although there may have been some slight deviation and some *dicta* suggesting a different rule, the uniform current of opinion in this court has been, that in actions for the tortious conversion of chattels, or for a breach of contract by the nondelivery thereof, in the absence of any proof of circumstances showing that the plaintiff has suffered other specific and particular damages which were the natural and proximate result of the tort or breach of contract, the measure of damages is the value of the property at the time of the conversion, or at the time when the same was to be delivered, with interest thereon from such date to the day of trial. In this court, the rule above stated has been approved in the following cases:

Ainsworth v. Bowen, 9 Wis. 348, was an action for the conversion of a school land certificate, and the court say, Justice COLB delivering the opinion: "The measure of damages would be the value of the certificate at the time of such conversion." *Nudd v. Wells*, 11 Wis. 407, was an action against a carrier for the nondelivery of goods according to his contract. Justice PAINE delivering the opinion of court, says: "The general rule as to damages for nondelivery of goods by a common carrier is the value of the goods, with interest from the day when they should have been delivered;" citing Sedgwick on Damages as his authority for the rule. *Meshke v. Van Dorn*, 16 Wis. 319. In this action an attachment had been issued by the plaintiff, and a quantity of wheat belonging to the defendant had been seized thereon. The attachment had been dissolved upon a trial upon the traverse of the affidavit; and the question was, what damages the defendant should recover against the plaintiff for the taking and detention of the wheat upon the attachment. Justice COLE, delivering the opinion, says:

"The testimony showed that wheat bore about the same market

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value when seized upon the attachment as when redelivered to the defendant. In the intermediate period it appears that there was a considerable rise in the price for a day or so. The defendant claimed that he should have the benefit of this rise in the value, although he did not show that he could or would have sold at that price. He was of course entitled to recover damages for any loss which he had sustained in consequence of being deprived of the use and control of his property during the pendency of the attachment, or for any injury thereto or loss thereof. * * * These damages the jury were directed to allow him under the rule laid down by the court; but to have permitted him to recover the difference between the highest market value of the wheat at any time during the pendency of the attachment, and the value when redelivered to him, without giving any testimony that he could or would have availed himself of that opportunity to sell, it seems to us would have been erroneous. Such a rule would be giving damages for injuries which the party had never sustained."

Noonan v. Ilsley, 17 Wis. 314, was an action to recover the value of \$300 of Watertown Railroad stock, which was agreed to be delivered on a certain day; and it was held that the measure of damages was the value of the stock on the day it was to be delivered, and interest thereon to the day of trial. In *Tenney v. State Bank of Wisconsin*, 20 Wis. 152, Chief Justice DIXON, in delivering the opinion of the court, says: "In cases of the conversion of personal property, the value of the property at the time of the conversion, with interest, by way of damages, to the time of recovery, has always been considered a just and adequate compensation. If Inbush had taken the vessel without any legal right, and converted it with no circumstances tending to show malice, or if he had destroyed it by an act of negligence, the rule of damages would have been the value and interest." *Flick v. Wetherbee*, 20 Wis. 392; *Pickering v. Bardwell*, 21 Wis. 562, was an action against a vendee of a quantity of wheat, which he had purchased and agreed to take at a fixed time. The vendee refused to take the wheat and pay the price agreed upon. The vendor, after tendering the wheat, kept the same some fifteen months; and then sold it for a much less price than the defendant had agreed to pay for the same, and claimed as his damages the difference between the price for which it was sold and the price agreed to be paid therefor by the defendant, and interest. The court say:

"Now the plaintiff kept the wheat in this case some fifteen months after the default of the defendant. It appears that the wheat might have been sold soon after the defendant failed to accept and pay for it; and in the most favorable view which can be taken of the case for the plaintiff, he ought only to recover the difference between the contract price and the market value of the wheat at about the time the defendant should have received it. Perhaps the plaintiff might wait a short time after the expiration of the fifteen days, to see whether the defendant would receive the wheat as he said he would; but certainly he could not wait fifteen months, until the condition of the market was entirely changed, and then sell, and call upon the defendant to make up the deficiency between the contract price and the one realized."

In *Bonesteel v. Orvis*, 22 Wis. 522, which was an action of replevin for a stock of merchandise, the court say: "The proper rule of damages is to ascertain the value of the goods at the time they were taken from the possession of the plaintiffs, that is, their market value—the sum for which they could be sold at that place—and to allow plaintiff this amount with interest thereon. * * * And in ordinary cases the amount of damages which the owner is entitled to recover for goods wrongfully taken from his possession is the market price with interest thereon. As a general rule this is deemed in law a compensation for the loss he has sustained, and this court has laid it down in a number of cases as the proper measure of damages." In *Bigelow v. Doolittle*, 36 Wis. 115, the court say: "Were this an action of trover the rule of damages would be the value of the property when seized, and interest thereon to the time of trial."

The only cases in this court which intimate that a different rule of damages should prevail are the cases of *Weymouth v. C. & N. W. Railway Co.*, 17 Wis. 550, and *Webster v. Moe*, 35 id. 75.

In the case of *Weymouth v. Railway Co.* the only contention was whether the rule of damages should be the value of the property at the place where the defendant took it, or its value at the place to which it was carried by the defendant, which in that case was much greater than at the place where it was taken. The action was replevin. The court held that the plaintiff's damages, in case a return of the property could not be had, was the value at the place of taking with interest, and not the increased value which had been added to it by the labor of the defendant. Incidentally,

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in his opinion, Justice PAINE says: "The value of the property at the moment of conversion, with such increase as it may have received from fluctuations of the market or other causes independent of the acts of the defendant, should be the measure of damages." That this remark as to the rule of damages was not understood by the court as qualifying the general rule which had been laid down in the cases above referred to, is evident from the subsequent decisions in the cases of *Single v. Schneider*, 24 Wis. 299; *Hungerford v. Redford*, 29 id. 345; and *Single v. Schneider*, 30 id. 570. In the case in 24 Wis. 299 it was said that the rule of damages in the action of replevin was the difference between the whole value of the article when replevied and the addition to its former value made by the defendant's labor. In the case in the 29 Wis. 345, it was held that when the defendant cut the logs in good faith, believing that the land was his, the damages would be the value of the stumpage or standing timber, with interest; and in 30 Wis. 570 it was held that the measure of damages was the value of the stumpage, even when the defendant knew that he was a trespasser at the time he cut the logs.

Although the last two cases fix no time at which the value of the stumpage should be estimated, it may be inferred that they were intended to follow the rule laid down in the case of *Weymouth v. Railway Co.* and *Single v. Schneider*, 24 Wis. 299, *supra*; that is, that in a case of replevin, when the chattels were in the possession of the defendant at the time the action was commenced, and presumably when the same was tried, the plaintiff may, if he recover and cannot obtain possession, recover as his damages the value of the chattels at the time the same were converted, with interest; or, in lieu thereof, the value of the same at the time of the trial, excluding such additional value as shall have been added thereto by the labor of the defendant.

It will be seen by an examination of the language used by Justice PAINE, that he does not give sanction to the rule that the plaintiff may recover as his damages the highest market value at any time intermediate the tortious taking and the day of trial, but that he may recover its value at the time of its conversion, and such increase as it may have received from fluctuations of the market or other causes independent of the acts of the defendant. The increased value here spoken of is the increased value from such causes at the time of the trial, and not such as it may have had at any inter-

mediate period. This construction makes all the cases in replevin above cited harmonize, and is not in any way inconsistent with the other rule, that in actions to recover damages for the conversion of chattels the value at the time of conversion, with interest, is the measure of damages. In cases of the latter kind, it is immaterial whether the property is in existence, or even in the hands of the defendant at the commencement of the action or at the time of the trial. In the case of replevin, ordinarily, the property is in the hands of the defendant when the action is commenced, and is supposed either to be in his hands or in the hands of the plaintiff at the time of the trial. If it be in the hands of the plaintiff, the question of damages as to the value of the property does not arise unless the defendant recovers; and if it be in the hands of the defendant and the plaintiff recovers, as the title has always been in him and is still in him, the defendant ought not to be permitted to retain the same, in case it is then worth more than at the time of the conversion, when such increased value is attributable to other causes than the labor and money spent on the same by the defendant without paying the plaintiff such increased value; and this is the extent to which these cases go.

The general rule as to the measure of damages established by these cases in the action of replevin, where the property is still *in esse* and in the hands of the party committing the wrong, is the value of the property at the place where the same was taken, at the time of the trial, whether such value be greater or less than it was at the time of the taking, excluding any value added by the labor or money of the wrong-doer; and when such value is less than the value at the time of the taking, for any cause, the party may also recover, as damages, the difference between such values, in addition to any special damages he may have sustained by the loss of the use of the same during such time.

After the last decision in the case of *Single v. Schneider* was made, the legislature, undoubtedly supposing the rule laid down in that case was likely to be a source of injustice toward those who owned pine lands, and had invested their money in such lands as permanent investments, passed the law of 1873, prescribing a different rule of damages against persons who wrongfully and willfully cut and carry away logs and timber which do not belong to them.

This act, however, carefully follows the rule of damages laid down by this court in actions of tort for the recovery of damages for the

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conversion of chattels, even in actions for cutting timber, by allowing the defendant to allege that the cutting was done by mistake, and tender the value of logs at the time the same were cut, with interest to the date of such tender and ten per cent additional, with costs. And such tender becomes a full defense to the action, if the jury find on the trial that the cutting was by mistake, and that the tender was the full value of the logs at the time of the cutting, with the interest and the penalty of ten per cent. The ten per cent, added in this case, we consider as very much in the nature of a penalty, although not strictly so.

The case of *Webster v. Moe*, 35, Wis. 75, was tried after the passage of this law, and the decision was based wholly on the fact that, in actions for cutting logs, the legislature had fixed a rule of damages, and although that action was commenced before the act was passed, yet in deference to the legislature, the court applied the legislative rule to the case. It would therefore be a perversion of the language used in that case to hold that the court intended to establish a general rule contrary to the whole course of decisions in the court from the time of its first organization.

It certainly cannot be said that this court has in any case decided, that either in actions for the non-delivery of chattels according to agreement, or in actions to recover damages for the conversion of the same, the plaintiff may recover as damages the highest market value of the chattels at any time intermediate the time when they should have been delivered according to contract, or the time when they were converted, and the day of trial. On the other hand, we think the uniform course of decision is, that the measure of damages is the value of the property at the time fixed for the delivery, or at the time of the conversion, with interest to the day of trial; the only exception to the rule being that in case of replevin, where the property is *in esse* and supposed to be in the hands of the defendant at the time of the trial, if plaintiff recovers, he may recover as his damages the value of the property on the day of trial, excluding any value added to the same by labor or money of the defendant or those under whom he claims.

If the question were open for consideration in this court, and we were at liberty now to fix a rule of damages in cases like the one at bar, we should feel constrained to fix the one which has already been established by this court. It is said that the rule giving as damages the highest market value intermediate the conversion or

day of delivery and the day of trial, should be applied to articles of trade and commerce which fluctuate in value from day to day ; and that to adhere to the rule of value at the time of the conversion would in many cases allow the wrong-doer to make profit out of his own wrong, or at all events it might prevent the plaintiff from taking advantage of a rising market, and thereby might deprive him of his reasonable expectations of profit from his investments.

There can be no force in the argument that the defendant would be allowed to make money out of his own tortious act. If the wrong-doer sells the property which he has unlawfully taken from another, the owner of the property can waive the tort and sue the tort-feasor for the money he has received upon such sale of his property, and thereby prevent him from making a profit out of his wrong. But the rule which allows the plaintiff to recover the highest market value is objectionable, because it allows him to recover speculative damages, especially when a long time elapses between the conversion and the day of trial. In most cases property which rapidly changes in value is not retained in the possession or ownership of one person for a great length of time, and it would be a matter of the utmost doubt whether the plaintiff, had he not been deprived of the possession of his property, would have realized the highest market value to which it might have attained during the time of the conversion and the time of trial ; and in those cases where the market value is very fluctuating, great injustice would be done by this rule to the man who honestly converted such property, in the belief that it was his own, if after the lapse of five or six years, he should be called upon to pay the highest market value it had attained during that time. The hardship of enforcing this rule in the case of stocks, which is perhaps property of the most unfixed value, forced the Court of Appeals in New York to repudiate the rule, after it had been partially adopted by the courts of that State. See *Baker v. Drake*, 53 N. Y. 211; s. c., 13 Am. Rep. 507; *Bank v. Bank*, 60 N. Y. 42.

The difficulties and injustice of the rule of the highest market price has led to various modifications of it by the courts which have adopted it; some courts having so modified it as to confine it to the highest price between the date of conversion and the commencement of the action; others to the time of commencement of the action, provided the action be commenced within a reasonable time; and others between the time of conversion and the time of

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trial, provided the action be commenced within a reasonable time. In California, where the courts had been holding to the rule of the highest market value, in the case of *Page v. Foster*, 39 Cal. 412, when under this rule the plaintiff had recovered the sum of \$25,763 for a quantity of hay which, when taken by the defendant, was worth only the sum of \$2,500, after an elaborate discussion of the case and reference to a large number of authorities, the court finally settled down upon the rule that the plaintiff might recover the highest market price to which the property might attain within a reasonable time after the property had been taken, with interest computed from the time such value was estimated to the day of trial.

Mr. Field in his work upon the Law of Damages, after an examination of all the cases, says: "The rule of valuation of the property at the time of the conversion, with interest, prevails in Massachusetts where there is no claim for special damages; and this general rule has been recognized in Pennsylvania, Kentucky, Missouri, West Virginia, New Hampshire, Connecticut, Maine, Vermont, Illinois, Wisconsin, Louisiana, Mississippi, Nevada, Florida, Delaware, Maryland, Minnesota, New York, Texas and Iowa." Field on the Law of Damages, 629, 630, and cases there cited. Sedgwick, in his work on Damages (6th ed.), p. 591, says: "On principle the value at the time of the conversion should control, unless the plaintiff is deprived of some special use of the property anticipated by the wrong-doer." "It appears to me that upon principle, unless the plaintiff has been deprived of some particular use of his property of which the other party was apprised, and which he may be thus said to have directly prevented, the rights of the parties are fixed at the time of the illegal act, be it refusal to deliver or actual conversion, and the damages should be estimated as at that time."

The rule as above stated by Sedgwick has not only been adopted by the courts of the several States above mentioned, but it is undoubtedly now the rule in the English courts. In the case of *France v. Gaudet*, L. R., 6 Q. B. 199, decided in 1871, it was held that in an action for the conversion of a quantity of champagne the plaintiff was entitled to recover the value at the time of the conversion, with interest, and that the fact that he had made a bargain to sell the same at a specified price to a solvent customer was evidence of its value, there being no other in the market of the

same quality to be procured at that time. Justice MELLOR, who delivered the opinion, says: "We are of the opinion that the true rule is to ascertain the actual value of the goods at the time of the conversion, and that a *bona fide* sale having been made to a solvent customer at 24 shillings per dozen, which would have been realized had the plaintiff been able to obtain delivery from the defendants, the champagne had, owing to these circumstances, acquired an actual value of 24 shillings per dozen; and we think that in the present case that ought to be the measure applied;" and in another place he says: "The conversion consists in withholding from another property to the possession of which he is immediately entitled, and the circumstances which affix the value are then determined."

The rule fixing the measure of damages in actions for breaches of contract for the delivery of chattels, and in all actions for the wrongful and unlawful taking of chattels, whether such as would formerly have been denominated *trespass de bonis* or trover, at the value of the chattels at the time when delivery ought to have been made, or at the taking or conversion, with interest, is certainly founded upon principle. It harmonizes with the rule which restricts the plaintiff to compensation for his loss, and is as just and equitable as any other general rule which the courts have been able to prescribe, and has greatly the advantage of certainty over all others.

We have concluded, therefore, to adhere to the general rule laid down by this court in the cases cited, and hold that in all actions, either upon contract for the non-delivery of goods or for the tortious taking or conversion of the same, "unless," in the language of Sedgwick, above quoted, "the plaintiff is deprived of some special use of the property anticipated by the wrong-doer," and in the absence of proof of circumstances which would entitle the plaintiff to recover exemplary or punitive damages, the measure of damages is, *first*, the value of the chattels at the time and place when and where the same should have been delivered, or of the wrongful taking or conversion, with interest on that sum to the date of trial; *second*, if it appears that the defendant, in case of a wrongful taking or conversion, has sold the chattels, the plaintiff may, at his election, recover as his damages the amount for which the same were sold, with interest from the time of the sale to the day of trial; *third*, if it appears that the chattels wrongfully taken

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or converted are still in the possession of the defendant at the time of the trial, the plaintiff may, at his election, recover the present value of the same at the place where the same were taken or converted, in the form they were in when so taken or converted.

These rules will prevent the defendant from making profit out of his own wrong, will give the plaintiff the benefit of any advance in the price of the chattels when defendant holds possession of the same at the time of the trial, and on the whole will be much more equitable than the rule given by the court below. It will be understood that we do not intend that these rules shall apply to cases which come under the provisions of chapter 263, Laws of 1873, now section 4269, R. S. 1878, or under the provisions of any other statute which may prescribe the damages which may be recovered in a given case.

The evidence is not sufficiently clear to justify this court in fixing the value of the grain and hay at the time the same were converted by the defendant, and we are unable, therefore, to direct that the verdict may stand for the balance, if the plaintiff shall remit a certain amount of the damages recovered, and that judgment may be entered for such balance; but as there seems to be no probable defense to the action, it will be an easy matter for the parties to agree upon the damages which the plaintiff will be entitled to recover under the rule established by this opinion, and thereby avoid the necessity and expense of a new trial; and we must leave that matter to the discretion of the parties.

BY THE COURT.—The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

Judgment reversed.

KLAUBER V. BIGGERSTAFF.

(47 Wis. 551.)

Negotiable instruments — certificate of deposit payable in "currency."

The word "currency," in a certificate of deposit, means money, and bank notes issued by lawful authority and in circulation at par with coin, and a certificate of deposit payable to order in "currency" is negotiable.*

* Contra: *Huse v. Hamblin*, (39 Iowa, 501), 4 Am. Rep. 264.

GARNISHMENT proceedings. The property in question was a certificate of deposit as follows: "\$1,000, Madison, Wis., Nov. 19, 1878. D. S. Slater, Esq., has deposited in the State Bank one thousand dollars, payable to himself in currency on the return of this certificate. [Signed by the cashier.]" This was indorsed to Biggerstaff by Slater. As matter of law, the court held that the certificate was not negotiable, and the fund was liable to garnishment. Judgment was accordingly rendered against the garnishee.

F. J. Lamb, for appellant.

Gregory & Pinney, for respondents. The rule, with few exceptions, has always been, that bills of exchange or certificates of deposit payable in "currency" or in "current funds" are not negotiable (Pars. on Notes and Bills, 45-7; Edw. on Bills, 134-5); and this court has so decided in three several cases. The ground of those decisions was, that such paper is not payable in money. *Ford v. Mitchell*, 15 Wis. 305 (1862); *Platt v. Sauk Co. Bank*, 17 id. 223 (1863); *Lindsey v. McClelland*, 18 id. 481 (1864).

RYAN, C. J. The controlling question in this case is, whether the certificate of deposit stated in the proceedings is negotiable.

"A promissory note may be defined to be a written engagement by one person to pay another person therein named, absolutely and unconditionally, a certain sum of money at a time specified therein." Story on Prom. Notes, § 1. The ordinary form of a certificate of deposit of money falls precisely within the definition, and it seems strange that there ever was a doubt that it was in law a negotiable promissory note. *O'Neill v. Bradford*, 1 Pin. 390, and cases there cited. Such doubt, however, may now be considered at rest. *Kilgore v. Bulkley*, 14 Conn. 362; *Bank v. Merrill*, 2 Hill, 295; *Miller v. Austen*, 13 How. 218.

The learned counsel for the respondents concedes this; but he takes the position that the certificate of deposit in question is not a promissory note, because it is not payable in money. It is for so many dollars, payable in currency; and the learned counsel contends that the word *currency* does not express or imply money. It must be conceded that the cases in this court, *Ford v. Mitchell*, 15 Wis. 305; *Platt v. Bank*, 17 id. 223; and *Lindsey v. McClelland*, 18 id. 481, which he cites in support of his position, lend strong sanction to it.

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These cases were decided, respectively, in 1862, 1863 and 1864, when the paper money, circulating in the State *de facto*, was of a very heterogeneous character. How much influence this fact had on those decisions, or on similar decisions elsewhere, it is impossible to say. It is perhaps not altogether an uncommon infirmity of judicial rules, that they are made in view of exceptional conditions of things presently existing. Passing evils or exigencies should have little weight in general rules of decision. Judicial rules ought properly to be based upon the general condition of society, and to be broad enough to meet occasional derangements incident to it.

In *Ford v. Mitchell* the certificate of deposit was payable in "currency," and protested for non-payment. It had been received by the plaintiff upon a sale made by him to the defendant. A majority of the court concurred in the judgment, on the ground that the plaintiff might recover for the original consideration. So DIXON, C. J., who delivered the principal opinion, holds. But his opinion also holds that the defendant was liable as a guarantor by force of his indorsement of paper not negotiable. PAINE and COLE, JJ., decline to express any opinion on the latter point.

In *Platt v. Bank* the certificate of deposit was payable in "current funds." The chief justice delivered the opinion of the court, stating that such paper had been held not to be negotiable in *Ford v. Mitchell*, and that the cases were not distinguishable; adding that the rule is sustained by an almost unbroken current of authority. In this the learned chief justice was not perhaps quite as accurate as usual; and he was manifestly mistaken in his statement of *Ford v. Mitchell*. Though the decision appears to have been unanimous, it plainly proceeded somewhat upon a mistake.

In *Lindsey v. McClelland* the certificate of deposit was payable in "current funds," and was protested for non-payment. The opinion of the court is delivered by Mr. Justice COLE, who not unnaturally falls again into the mistake that the court (in *Ford v. Mitchell*) had held that the words "payable in current funds" rendered the instrument not negotiable. *Platt v. Bank* is not cited. The opinion states that the certificate "is not payable in money, or what the court is bound to consider equivalent to money." The opinion then proceeds to show that if the certificate had been negotiable, it had been protested so as to hold the defendant as indorser; and further that it had not been received in payment, implying that the plaintiff might recover on the original consideration.

It is thus seen that *Platt v. Bank* is perhaps the only case in this court positively adjudging that an instrument payable in *current funds* is not negotiable, and that there is no case so holding of an instrument payable in *currency*. *Prima facie* there might seem to be little difference in the two terms; but the opinion of the court in *Platt v. Bank* gives a construction to the term *current funds* which the term *currency* could not properly bear. "It was suggested at the bar that the certificates might be deemed payable in the treasury notes of the United States, and therefore negotiable, since the law of Congress declares such notes to be equivalent to gold and silver coin in payment and tender for debts. But the words 'current funds' cannot be so construed. They were undoubtedly intended to include all funds bankable in this State, and any such funds would answer the description and satisfy the contract. A tender in any of the notes of the banks of this State passing as currency would have discharged the obligation."

With such a construction of the term used, the instrument was not payable in money, and therefore not negotiable. So are nearly all of the authorities on paper positively payable in specific kinds of bank-notes, or in bank-notes generally, because not necessarily money.

The true and only test in this respect of the question whether an instrument be negotiable under the statute of Anne is always whether it is payable in money.

Money is a generic and comprehensive term. It is not a synonym of coin. It includes coin, but is not confined to it. It includes whatever is lawfully and actually current in buying and selling, of the value and as the equivalent of coin. By universal consent, under the sanction of all courts everywhere, or almost everywhere, bank-notes lawfully issued, actually current at par in lieu of coin, are money. The common term, "paper money," is in a legal sense quite as accurate as the term, "coined money."

The question whether bank-notes are money or only *chooses in action* was directly involved in *Miller v. Race*, 1 Burr. 452.

"The whole fallacy of the argument," says Lord MANSFIELD, in delivering the unanimous opinion of the court, "turns upon comparing bank-notes to what they do not resemble and what they ought not to be compared to, viz., to goods or to securities, or documents for debts.

"Now they are not goods, not securities, nor documents for debts,

nor are so esteemed; but are treated as *money*, as *cash*, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and *currency* of money to all intents and purposes. They are as much money as guineas themselves are, or any other *current* coin that is used in common payments as money or cash.

"They pass by a will which bequeaths all the testator's money or cash, and are never considered as securities for money, but as money itself. Upon Lord AILSBURY's will £900 in bank-notes was considered as cash. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes.

"So, on bankruptcies, they cannot be followed as identical and distinguishable from money, but are always considered as money or cash.

"It is a pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said 'that the reason why money cannot be followed is because it has no ear-mark;' but this is not true. The true reason is, upon account of the *currency* of it, it cannot be recovered after it has passed in *currency*. So, in case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration; but before money has passed in *currency* an action may be brought for the money itself. * * *

"Apply this to the case of a bank-note: An action may lie against the finder, it is true (and it is not at all denied), but not after it has been paid away in *currency*. And this point has been determined, even in the infancy of bank-notes; for 1 Salk. 126, M. 10, W. 3, at *nisi prius*, is in point. * * * *

"Another case cited was a loose note in 1 Ld. Raym. 738, ruled by Ld. Ch. J. HOLT, at Guildhall, in 1698, which proves nothing for the defendant's side of the question; but it is exactly agreeable to what is laid down by my Ld. Ch. J. HOLT in the case I have just mentioned. The action did not lie against the assignee of the bank-bill, because he had it for a valuable consideration.

"In that case he had it from the person who found it; but the action did not lie against him, because he took it in the course of *currency*, and therefore it could not be followed in his hands. It never shall be followed into the hands of a person who, *bona fide*,

took it in the course of *currency*, and in the way of his business.

* * *

"A bank-note is constantly and universally, both at home and abroad, treated as money — as cash ; and paid and received as cash ; and it is necessary for the purposes of commerce that their *currency* should be established and secured."

This case was approved or followed in *Clarke v. Shee*, Cow. 197; *Lowndes v. Anderson*, 13 East, 130 ; *Solomons v. Bank*, id. 135 ; *Wright v. Reed*, 3 T. R. 554 ; *Camidge v. Allenby*, 6 B. & C. 373 ; *De la Chaumette v. Bank*, 9 id. 208 ; *Snow v. Peacock*, 3 Bing. 406 ; *Strange v. Wigney*, 6 id. 667, and other cases. And the opinion of Lord MANSFIELD goes far to make the word "*currency*" equivalent to the word "*money*."

It has also been very generally followed in this country. In *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333, Mr. Justice STORY, in delivering the opinion of the court, says : "Bank-notes constitute a part of the common *currency* of the country, and ordinarily pass as money. When they are received as payment, the receipt is always given for them as money. They are a good tender as money, unless specially objected to ; and, as Lord MANSFIELD observed in *Miller v. Race*, 1 Burr. Rep. 457, they are not, like bills of exchange, considered as mere securities or documents for debts."

Here is a distinction, recognized in many of the cases, between *currency* which is money and *currency* which is legal tender. To be money, part of the circulating medium, it is not essential that *currency* should be legal tender against the wishes of the person to whom it is tendered. Even coined money is not, under all circumstances, legal tender. *Sears v. Dewing*, 14 Allen, 413 ; *Mather v. Kinike*, 51 Penn. St. 425.

But paper *currency*, bank-notes which are current *de jure et de facto*, are legal tender unless specially objected to at the time of tender, for the reason that they are money, though not absolutely legal tender. With some exceptions this doctrine is general in this country. *Thompson v. Riggs*, 5 Wall. 663 ; *Veazie Bank v. Fenno*, 8 id. 533 ; *Hepburn v. Griswold*, id. 603 ; *Legal Tender Cases*, 12 id. 457 ; *Young v. Adams*, 6 Mass. 182 ; *Snow v. Perry*, 9 Pick. 539 ; *Wood v. Bullens*, 6 Allen, 516 ; *Bush v. Baldrey*, 11 id. 367 ; *Moody v. Mahurin*, 4 N. H. 296 ; *Cummings v. Putnam*, 19 id. 569 ; *Brown v. Simons*, 44 id. 475 ; *Frothingham v. Morse*, 45 id. 545 ; *Keith v. Jones*, 9 Johns. 120 ; *Judah v. Harris*, 19 id. 144 ; *Leiber*

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v. *Goodrich*, 5 Cow. 186; *Pardee v. Fish*, 60 N. Y. 265; s. c., 19 Am. Rep. 176; *Frank v. Wessels*, 64 N. Y. 155; *Mann v. Mann*, 1 Johns. Ch. 231; *Bayard v. Shunk*, 1 W. & S. 92; *Legal Tender Cases*, 52 Penn. St. 9; *Buchegger v. Shultz*, 13 Mich. 420; *Williams v. Rorer*, 7 Mo. 556; *Seawell v. Henry*, 6 Ala. 226; *Ball v. Stanley*, 5 Yerg. 199; *Cooley v. Weeks*, 10 id. 141; *Noe v. Hodges*, 3 Humph. 162. Several of these cases will be found to hold that while gold and silver were at a high premium above paper, and not circulated as money, coin was not to be considered as currency but as a commodity; that the whole currency of the country then consisted of paper money, circulation at par being an essential quality of currency.

In fact almost all civilized countries, including this country, have a mixed circulation of coin and bank-notes. These constitute the currency of the country—its money; and the general term, “currency,” includes both. Currency therefore means money—coined money and paper money equally. But it means money only; and the only practical distinction between paper money and coined money, as currency, is that coined money must generally be received, paper money may generally be specially refused, in payment of debt; but a payment in either is equally made in money—equally good. The confusion in the cases appears to have arisen for want of proper distinction between money which is current and money which is legal tender. The property of being legal tender is not necessarily inherent in money; it generally belongs no more to inferior coin than to paper money.

In the use of the term, currency does not necessarily include all bank-notes in actual circulation, for all bank-notes are not necessarily money. In this use of the term, currency includes only such bank-notes as are current *de jure et de facto* at the *locus in quo*; that is, bank-notes which are issued for circulation by authority of law, and are in actual and general circulation at par with coin, as a substitute for coin, interchangeable with coin; bank-notes which actually represent dollars and cents, and are paid and received for dollars and cents at their legal standard value. Whatever is at a discount—that is, whatever represents less than the standard value of coined dollars and cents at par—does not properly represent dollars and cents, and is not money, is not properly included in the word “currency.” In this sense, National bank-notes, which are not legal tender, are now as much currency as treasury notes, which are legal tender.

This construction of the term, "currency," might perhaps properly be extended to the term, "current funds." It must extend to the latter term whenever it is used in the legal sense of money. Bankers and money dealers cannot by choice or use of terms give the character and attributes of money to any thing not money—to any thing of less value than money.

The legislature has doubtless power to make negotiable paper other than for the payment of money (*Price v. Ins. Co.*, 43 Wis. 267); but where a statute is plainly intended to apply to money, every term used to indicate money, not commodities, must be held to signify money in the sense in which that term is here used.

The certificate of deposit in this case calls for so many dollars, that is to say, for so much money. It makes them payable in currency, which also means money. It could be paid only in money. It was therefore clearly negotiable under the statute of Anne. Whether the holder could claim its payment in legal tender is a different question, not in this case and not passed upon.

So far the question has been considered under the law as it stood when *Ford v. Mitchell*, *Platt v. Bank* and *Landsey v. McClelland* were decided, and in upholding the negotiable quality of the certificate of deposit in this case it has not been found necessary expressly to overrule any of those cases; hardly any of the language used in the opinions given upon them.

[Omitting a statutory consideration.]

The negotiability of certificates of deposit is of vast importance in commerce. Their want of negotiability upon slight grounds would go largely to prevent their usefulness in the course of business; and this court considers it far wiser to hold them payable in money, when the terms used will admit of that construction, than to hold them not to be negotiable on the ground of the particular terms used.

BY THE COURT.—The judgment is reversed, and the cause remanded to the court below, with directions to render judgment for the garnishee, the appellant here.

Judgment reversed.

MELLEN V. GOLDSMITH.

(47 Wis. 578.)

Compromise — composition deed — oral agreement to execute.

A creditor, having orally agreed with the debtor and with other creditors to join in a composition deed at a specified rate, and refusing to sign it, such deed having been executed by the others, can recover only the rate fixed in the agreement.

ACTION on note and account. The opinion sufficiently states the facts. The defendant had judgment below.

J. F. McMullen, for appellants.

Carpenter & Smiths, for respondents.

ORTON, J. There was testimony tending to show that the appellants verbally agreed with the respondent and his other creditors that they would compromise their claims against him, and sign a deed of composition for sixty cents on the dollar, in consideration and upon the condition that the other creditors would do so; and that the other creditors did so compromise and sign such deed, and the appellants refused to so do, and refused to accept such per cent in satisfaction of their claim tendered for such purpose by the respondent.

The jury probably and very properly might have found their verdict upon this evidence, and this court ought not to disturb the verdict upon the mere weight or preponderance of the evidence.

The evidence relating to the proceedings of the creditors' meeting, and their action upon the proposition of the respondent, is not material, when it was shown — and it is not disputed — that immediately thereafter all of the creditors except the appellants signed the composition according to the agreement which the jury must be presumed to have found was so made by the parties and the other creditors.

The exceptions taken to the rulings of the court in admitting or rejecting testimony, and in giving or refusing to give instructions to the jury relating to such meeting or its proceedings, are therefore immaterial, and will not be further considered.

The instructions given clearly express the law upon the legal effect of such an agreement, and submit to the jury the question of fact; and although there may be some clauses and abstract propositions of law not strictly correct, the charge taken together and fairly construed did not, we think, mislead the jury upon the material question in the case.

The really important and only material question here is, was this agreement valid and binding upon the appellants, so that its performance by the other creditors and the respondent, in respect to their claims, and the offer of performance by the respondent in respect to the claims of the appellants, constitute a valid defense to this action, brought to recover the full amount?

The validity of such an agreement does not depend upon the technical and strict rules which govern accord and satisfaction, release and discharge, but upon principles of equity, which treat the violation of or failure to execute such an agreement as a fraud, not only upon the debtor, but more especially upon the other creditors, who have been lured in by the agreement to relinquish their further demands, upon the supposition that the debtor would thereby be discharged of the remainder of his debts. In *Anstey v. Marden*, 1 B. & P. 124, the plaintiff at one time orally agreed with the other creditors to accept a composition of ten shillings on the pound, and to assign his claim to Weston, who was to advance the money; but when the agreement was drawn up he refused to sign it, although the other creditors had signed it and received their money. ROOKS J., said: "Anstey is not the only person here concerned. If he were suffered to recover, he would be guilty of a gross fraud on the other creditors."

In *Norman v. Thompson*, 4 Exch. 755, the plaintiff verbally agreed with the debtor defendant and a part of his other creditors, that he would accept ten shillings on the pound for his claim, if they would do the same, and afterward refused to carry out the agreement. Upon demurrer to the replication of the plaintiff, averring that he did not so agree, *modo et forma*, POLLOCK, C. B., said: "I do not think there is any ground for doubting that such an agreement is binding. It is a good consideration for one to give up part of his claim, that another should do the same."

In *Bradley v. Gregory*, 2 Campb. 383, the plaintiff verbally agreed with the debtor and the other creditors to execute a composition deed containing a clause of release, for and by the payment of ten

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shillings on the pound of his claim, if the other creditors would do so, and then, upon the execution of the deed by the other creditors, he refused to sign it. Lord ELLENBOROUGH said: "I think the agreement in the present case operates as a satisfaction. But it is said the agreement is executory, and therefore can be no bar. I think it is executed. Every thing on the defendant's part was performed. As far as depended upon him, there has been satisfaction as well as accord. It is the plaintiff's own fault that he has not enjoyed the full benefit of all that he stipulated for. It would be unjust if the defendant could be sued in this action; and I am of opinion that, in point of law, the action is not maintainable."

In *Wood v. Roberts*, 2 Stark. 417, in which the facts are similar to those here, ABBOTT, L. C. J., said: "If the plaintiff had, by his undertaking to discharge the defendant, induced any other creditor to accept a composition and discharge the defendant from further liability, he could not afterward enforce his claim, since it would be a fraud upon that creditor."

In *Butler v. Rhodes*, 1 Esp. 236, the plaintiff and the other creditors had agreed with the defendant to sign a deed of composition for ten shillings on the pound; and after the other creditors had signed, the plaintiff refused to do so. Lord KENYON said that "it therefore never should be allowed to the plaintiff to recede from what he had undertaken, and to evade the effect of the composition by a refusal to execute the deed which had been prepared with his consent," and directed the jury to find for the defendant.

Any thing I could say in elaboration of this doctrine so authoritatively established and so tersely expressed by these great masters of the law might weaken its force, and it is sufficient further to say that this equitable doctrine has been followed almost uniformly by the courts. *Fellows v. Stevens*, 24 Wend. 294; *Browne & Co. v. Stackpole*, 9 N. H. 478; *Paddleford v. Thacher*, 48 Vt. 574; *Gardner v. Lewis*, 7 Gill, 377; *Farrington v. Hogdon*, 119 Mass. 453; *Murray v. Snow*, 37 Iowa, 410.

BY THE COURT. — The judgment of the county court is affirmed, with costs.

Judgment affirmed.

THOMPSON V. HERMANN.

(47 Wis. 602.)

Negligence — contributory — seaman obeying perilous order.

A common seaman is bound to obey orders, and if he receives an injury in obeying an order manifestly perilous he is not chargeable with contributory negligence.

ACTION for negligence producing personal injury. The amended complaint charged that the defendants are the owners, and one of them master, and the plaintiff a seaman of the vessel "Surprise," sailing on Lake Erie, between the ports of Ashtabula and Erie; that while a heavy sea was running and the vessel was pitching and rolling heavily, the jaw rope of the main gaff parted, and the gaff was unshipped, launched forward in front of the main mast, and swung over into the main rigging, and that the plaintiff, with other seamen, was ordered by the master to adjust the gaff, by standing upon the lower boom and pulling upon the bow-line fastened to one of the horns of the jaw of the gaff, and which was very likely and apt to slip from said horn, which was very smooth, worn and slippery, and cause plaintiff to fall from said boom to the deck below, and be thereby injured, all of which was well known to the master; that the plaintiff, thinking it unsafe and dangerous to obey such order, objected and protested against the same, and informed the master, and insisted, that the main gaff could as well be adjusted by means of tackle then and there near at hand, and with safety to all concerned; but that the master refused to adopt such precautionary means, and imperatively ordered the work to be done in the dangerous way above stated; and that in the careful discharge of his duty in obedience to such order, the plaintiff fell from said boom and was injured, by reason of the slipping of the bow-line; and that the master was grossly negligent in not providing, adopting and using the safe and proper means and appliances for such work, and in ordering and directing it to be done in the dangerous manner above stated. A demurrer was sustained, and the plaintiff appealed.

Markhams & Smith, for appellant.

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Ludwig & Somers, for respondent. 1. A servant cannot recover unless the employer knew or ought to have known of the defect which caused the injury, and the employee did not know of it or had not equal means of knowledge. *Malone v. Hawley*, 46 Cal. 409; *McGlinn v. Brodie*, 31 id. 376; *Baltimore, etc., Railroad Co. v. Woodward*, 41 Md. 268; 4 Wait's Act. & Def. 417-18; Cooley on Torts, 555; 2 Hilliard on Torts, 467. One who places himself unnecessarily in a position of known danger cannot recover against the person whose negligence caused the danger. *Goldstein v. Railway Co.*, 46 Wis. 404; 1 Add. on Torts, 489, and cases there cited. 2. It is well settled that an employer has a right to judge for himself *how* he will have his work done (not violating the law of the land); and workmen, with knowledge of the circumstances, must judge for themselves whether they will do the work required in that manner. Cooley on Torts, 552; 2 Hilliard on Torts, 468. Even if a safer mode of doing some particular work is discarded by the master's orders, the servant cannot maintain an action for injuries sustained. *Dynen v. Leach*, 40 Eng. L. & E. 491. A servant may decline any service in which he reasonably apprehends injury to himself (*Paterson v. Wallace*, 1 Macq. 748; *Buzzel v. Manuf'g Co.*, 48 Me. 113; 1 Add. on Torts, 488); and being unfettered by any consideration but his own interests, if he incurs hazards which prove injurious he cannot in law complain. *Moss v. Johnson*, 22 Ill. 633.

ORTON, J. We think the amended complaint in this action states a cause of action, and that the demurrer should have been overruled.

It is objected by the learned counsel of respondent that the facts stated show that the service necessarily required by the employment was dangerous, and that the plaintiff, by entering upon it, took the risks and hazards upon himself, and that he was not bound to obey orders requiring such service, and might have declined the service and abandoned the employment, and was negligent in not so doing.

We think that the peculiar character of the employment, and the relations existing between the master and the common seaman of a merchant vessel outside of port, remove this case from these objections and the authorities cited to sustain them; and that although they might be correct legal propositions in respect to

other kinds of employment, they have scarcely any application here. There would seem to be, however, one principle applicable to all kinds of service, upon which this complaint might be sustained, irrespective of the peculiar character of this employment and the relations of the parties, and that is, that the master is bound to furnish safe machinery, means and appliances for the work required to be done, and that carelessness or negligence in these respects alone may be legal ground for recovery. *Smith v. C. M. & St. P. R'y Co.*, 42 Wis. 525; *Wedgwood v. C. & N. W. R'y Co.*, 44 id. 44, and many other cases in this court. But aside from this principle, the master occupies such a position of authority on board of his vessel at sea, and the common seaman such a position of subordination, that the seaman is bound to submit to the will, judgment and discretion of the master, and obey his orders in the management of the vessel or for its repair, and especially in rough weather and in cases of emergency; and any other principle would work insubordination and the destruction of all authority and discipline on board the vessel.

If each seaman, when ordered to perform any work or duty in the management or repair of the vessel, were allowed by law to exercise his own free will, discretion and judgment in all cases of danger, and obey the master or refuse obedience at his pleasure, such a right would directly lead to general mutiny, and be fraught with great danger and peril, not only to the one so insubordinate, but to all on board, and to the ship and cargo as well. The language of the books is, that "disobedience or misconduct of the sailor is of necessity punishable with great severity, because discipline must be preserved, and without it the ship would always be in great peril." 1 Parsons on Maritime Law, 463. "By the common law, the master has authority over all the mariners on board the ship, and it is their duty to obey his commands in all lawful matters relating to the management of the ship and the preservation of good order, and such obedience they expressly promise to yield to him by the agreement usually made for their service. * * * Such an authority is absolutely necessary to the safety of the ship and of the lives of the persons on board." Abbott on Shipping, 177. "A deliberate refusal to do duty has always been considered as one of the highest offenses by the maritime law. The power to command must reside somewhere, and the law has placed it in the master. He may exercise it properly, or *harshly and unjustly*, and

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for this he is answerable when he returns to port." *The Palledo*, 3 Ware, 321.

"The master has an absolute authority on board his ship, and his orders, if not unlawful, are and must be imperative; submission is amongst the first duties of the seaman." *U. S. v. Smith*, 3 Wash. C. C. 525. "In cases of necessity or calamity during the voyages the master is by law created agent for the benefit of all concerned, and his acts done under such circumstances, in the exercise of a sound discretion, are binding upon all parties in interest in the voyage." *Jordan v. Warren Ins. Co.*, 1 Story's C. C. 343. While treating upon the authority of the master, in the case of *The Almatia*, Deady, 478, the court says: "He had a right to have the sails furled to please his eye, and in accordance with his notions of what was *professional and seamanlike*. Some one must give the law upon these matters, and the general rule is that the seaman must obey what his master commands." The seaman on the voyage has no alternative but to obey or suffer punishment. He cannot dissent from or abandon the service on account of the dangers or unreasonableness of the particular service required, as he might do in port, but must obey at any risk or hazard to himself; and yet he voluntarily incurs no risk, but acts upon the risk and responsibility of those whose lawful authority demands of him implicit obedience to every lawful command, however unreasonable or dangerous, to which he reluctantly submits to his own personal injury. The law which imposes upon the master this almost absolute authority also imposes upon him the fullest responsibility for its careful, considerate and reasonable exercise in all emergencies, and in default of which it also imposes upon him a clear legal liability — or upon those he represents — for any personal damage, occasioned by such default.

The plaintiff, by protesting against the dangerous and unreasonable manner of accomplishing the object proposed, and by which he was injured, and suggesting a safer and more reasonable way of accomplishing the same object, and then submitting to the order and authority of the master, and attempting to do the work required in a careful and prudent manner, did his whole duty, and thereby removed from himself all of the responsibility. The master, by declining and rejecting the safer and reasonable manner proposed by the plaintiff, and by gross carelessness imperatively commanding the plaintiff to perform the work in the more dangerous way,

assumed all of the responsibility and risk for the defendants. The plaintiff entered upon this dangerous service under duress and submission to compulsion, without the liberty of choice or freedom of the will, and is therefore not responsible for his acts, without negligence. "Cases may and do arise when instant obedience to the orders of the mate is necessary, such as orders to take in sail in a sudden squall, or to cut away the rigging or spars, or to go aloft on a sudden emergent duty, when the mate may instantly enforce obedience by the application of positive force, and indeed of all the force required to produce prompt obedience." Flanders on Shipping, § 73; *U. S. v. Hunt*, 2 Story, 125; *U. S. v. Taylor*, 2 Sumn. 588.

The plaintiff avers that he used care, or was not in fault, in attempting with others to execute the orders of the master, and that he submitted to the judgment and authority of the master after protest, and thus most clearly brings himself within the protection of these principles, and establishes his right of recovery. He could not have safely or lawfully done otherwise than submit under the circumstances; for his disobedience would have been revolt and mutiny, and he would have been liable to personal hazard and punishment; and to hold, under such circumstances, that he cannot recover for his personal injuries, received without any fault of his own, and solely by the careless and unreasonable orders of his superior, would be outrageously unjust.

The owners of the vessel, for whom the master was acting *pro hac vice*, are liable for the injuries of the plaintiff caused by the want of skill and ordinary care in commanding such dangerous and unreasonable service. "By the general rule of the maritime law, the owners of a vessel are liable for all injuries caused by the misconduct, negligence or unskillfulness of the master, provided the act be done within the scope of his authority as master." Beawes' *Lex Mercatoria* (4th London ed.), 54; *Stinson v. Wyman*, Daveis, 172; *The Waldo*, id. 161; *Dusar v. Murgatroyd*, 1 Wash. C. C. 13.

In the case of *The State Rights*, Crabbe, 22-24, Mr. Justice HOPKINSON uses the following language, which is so comprehensive and expressive of the principles governing this case, that a copious quotation will be warranted: "In the case now before this court, I do not understand it to be denied that the owners of a vessel are answerable for the acts of their captain done within the course and scope of his employment and business. Is this not enough for this case? Assuredly it was within the course and scope of the employ-

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ment and authority of Captain Allen, to direct the 'State Rights' to be steered at his pleasure. He had full power to do this, derived from his owners, and all on board were bound to obey his orders without interposing their judgment as to the consequences to him or his owners. By the execution of such an order a wrong is done to another party. On what principles of the common or maritime law can the owners of the offending vessel, the principals of such an agent, whom they have armed with the power to do the wrong, throw the responsibility from themselves?"

These principles are further sustained by *Desty's Shipping and Admiralty*, 124; *Niagara v. Cordes*, 21 How. 7; *Stone v. Ketland*, 1 Wash. C. C. 142; *The Ben Flint*, 1 Abb. (U. S.) 126; *Reed v. Canfield*, 1 Sumn. 195; *Brown v. Overton*, Sprague, 462; *Brown v. The D. S. Cage and Owners*, 1 Woods, 401. This treatment of the subject of the liability of the owners for the tortious acts of the master of a vessel has been more extended because I have been unable to find any reported case of closely analogous facts.

BY THE COURT. — The order of the county court sustaining the demurrer to the amended complaint is reversed, with costs, and the cause remanded for further proceedings according to law.

Order reversed.

SANGER V. DUN.

(47 Wis. 615.)

Contract — liability of mercantile agency for attorney's default.

Plaintiffs intrusted a claim for collection to a mercantile and collecting agency, taking a receipt conditioned that the claim was to be transmitted to an attorney for collection or adjustment at the risk and on the account of the plaintiffs, and signing a similar agreement in the defendants' books. *Held*, that these instruments constituted the contract, and the defendants were not liable for the attorney's acts or default, in the absence of proof of gross negligence in selecting him.

ACTION against a mercantile and collecting agency, to recover the amount of an account put in their hands for collection, and by them intrusted to a local attorney for enforcement, who

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collected it and appropriated the proceeds. The facts appear in the opinion. The plaintiff had judgment below.

Finches, Lynde & Miller, for appellants.

Markhams & Smith, for respondents. Where persons holding themselves out as a collecting agency receive accounts for collection by their agents, they must be regarded as undertaking to transmit for collection to a faithful and responsible agent. *Bradstreet v. Everson*, 72 Penn. St. 124; s. c., 13 Am. Rep. 665; *Riddle v. Poorman*, 3 Penn. 224; *Cox v. Livingston*, 2 W. & S. 103; *Krause v. Dorrance*, 10 Barr, 462; *Wingate v. Mechanics' Bank*, id. 104; *Rhines v. Evans*, 16 P. F. Smith, 192; *Lewis v. Peck*, 10 Ala. 142; *Pollard v. Rowland*, 2 Blackf. 22; *Cummins v. McLain*, 2 Ark. 402; *Wilkinson v. Griswold*, 12 Sm. & M. 669; *Montg. Co. Bank v. Albany Bank*, 8 Barb. 396. The receipts relied upon by defendants would not bear the construction contended for by them; but if thus construed they would permit the defendants to take advantage of their own wrong, and would be void as contrary to public policy. *Candee v. W. U. Tel. Co.*, 34 Wis. 471-5; s. c., 17 Am. Rep. 452; *True v. Int. Tel. Co.*, 60 Mo. 9; *Tyler v. W. U. Tel. Co.*, 60 Ill. 421; s. c., 14 Am. Rep. 38; *Birney v. N. Y. & W. Tel. Co.*, 18 Md. 341; *Ellis v. Am. Tel. Co.*, 13 Allen, 226; *Sweatland v. Ill. & M. Tel. Co.*, 27 Iowa, 433; s. c., 1 Am. Rep. 285; *U. S. Tel. Co. v. Wenger*, 55 Penn. St. 262; *Redpath v. W. U. Tel. Co.*, 112 Mass. 71; s. c., 17 Am. Rep. 69; *Clarke v. Holmes*, 7 H. & N. 938; *Scott & J. on Tel.*, §§ 201-2.

COLE, J. We are all clear in the opinion that this case must be decided upon the receipts offered in evidence, which constitute the contract, and fix the rights and liabilities of the parties. These receipts are plain and distinct in their language, and no good reason was suggested on the argument why they are not valid and binding upon the parties executing them. True, it was said by the learned counsel for the plaintiffs, that the proof shows that Mr. Rockwell did not read the receipts, or know or understand that they contained a clause restricting the liability of the defendants. To this remark we answer in the words used by this and other courts when considering a similar question. It is not claimed that he was overreached or deceived otherwise than in the fact that he did not read or understand the contract which he signed; but that was his own

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negligence. It will not do for a man to enter into a contract, and, when called upon to abide by its conditions, say that he did not read it when he signed it, or did not know what it contained. *Fuller v. Madison Mutual Insurance Co.*, 36 Wis. 599; *Upton v. Tribilcock*, 91 U. S. 45; *Wheaton v. Fay*, 62 N. Y. 275; *Germania Fire Insurance Co. v. M. & C. Railroad*, 72 id. 90; s. c., 28 Am. Rep. 113; *Hill v. S. B. & N. Y. Railroad*, 73 N. Y. 351; s. c., 29 Am. Rep. 163.

Of course we are considering a case relieved from all pretense of fraud or imposition, for nothing of the kind was used in procuring the contract. The only reason for claiming that the plaintiffs are not bound by the restrictive clause in the receipts is, that Rockwell did not read them or understand that they contained such a restrictive clause when the papers were executed. But if he failed to read or understand the contract, it was his own fault, and the plaintiffs alone are responsible for the omission. Therefore, under the circumstances, we all think that the contract is binding upon the parties, and it must be conclusively presumed that they understood its terms and assented to them. This being so, the question is, what was the extent or degree of responsibility assumed by the defendants in the transaction? A majority of the court are of the opinion that the defendants were only liable, under the contract, for gross negligence in the selection of the attorney to whom the plaintiffs' account was sent for collection.

On the delivery of the account to the defendants, they gave the plaintiffs a receipt to the effect that the account was to be transmitted by mail, for collection or adjustment, to an attorney, at the risk and on the account of the plaintiffs—the proceeds to be paid over or accounted for to the plaintiffs when received by the defendants from the attorney. At the same time a receipt was signed by the plaintiffs in the books of the defendants stating the amount of the account, and that the claim was to be transmitted by mail to an attorney, at the risk and for the account of the plaintiffs. Such are the conditions of the receipts which constitute the contract between the parties; and the question therefore is, what liability did the defendants assume in the matter? On the part of the plaintiffs it is insisted, that as the defendants held themselves out to the world as a collecting agency, when they received the account of the plaintiffs, they undertook either to collect it themselves, or remit the same to some suitable attorney in that part of the country

where the debtors lived, to make the collection, and that they became responsible for the negligence or misconduct of the attorney whom they employed for that purpose.

It well may be that such would be the responsibility of the defendants, were it not for the restrictive clause in the receipts. But that clause, if any effect is given to it, clearly limits that liability; for it provides that the account is to be transmitted to an attorney for collection at the risk of the plaintiffs. Such being the case, we think the defendants are not liable for the acts or default of the attorney employed by them, unless in the selection of such attorney they were guilty of gross negligence; for it seems to us it was competent for the parties, by express contract, to limit the liability which the law would otherwise impose upon the defendants for the acts of the attorney employed by them to make the collection. We are not aware of any principle of law or public policy which condemns such a contract. In respect to the employment of sub-agents or substitutes, when provided for in the letter of attorney, Mr. Justice STORY lays down the general rule to be: "In such cases it is clear that the original attorney or agent will not be liable for the acts or omissions of the substitute appointed or employed by him, unless, in the appointment or substitution, he is guilty of fraud or gross negligence, or improperly co-operates in the acts or omissions." Story on Agency, § 201. Notwithstanding the clause in the receipts, it is sought to render the defendants responsible for the loss of the money collected by the attorney; in other words, virtually to make the defendants guarantors of the fidelity and integrity of such attorney, although there is not a particle of proof which tends to show that they were guilty of gross negligence in selecting him. We have not been referred to any case which carries the liability of an attorney or collecting agency to such an extent, under a contract like the one before us.

The case of *Bradstreet v. Everson*, 72 Penn. St. 124; s. c., 13 Am. Rep. 165, was much commented on by counsel on both sides as sustaining their respective positions; but as we understand that case, it does not sustain the views of plaintiffs' counsel. The court there decides, in effect, that a collecting agency which invites customers on the ground that it has facilities for making distant collections, and selects its agents to do its business, is liable for collections made by its agents, when it undertakes the collection by the express terms of its receipt. But the court expressly say, if the

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agency does not intend to assume such a liability, it has it in its power to limit its responsibility by its receipt; and as the receipt in that case contained no such restriction, the defendants were held liable for the collection made by one of its attorneys, to whom it had sent a claim belonging to the plaintiff.

The majority rest the decision expressly upon the restrictive clause in the receipt. Perhaps a greater liability might arise in the absence of such clause; but this is a point we need not consider, as we all agree that the restriction is legal and effectual. The majority think that the defendants are only responsible for gross negligence in selecting the attorney to whom the claim was sent for collection. That view is so in conflict with portions of the charge of the court below, which were excepted to, in regard to the rule of diligence imposed by the contract upon the defendants, that it must work a reversal of the judgment.

Therefore, without considering any other point, the judgment of the court must be reversed, and a new trial ordered.

BY THE COURT. — So ordered.

LYON and TAYLOR, JJ., dissented.

TOWNSEND V. SMITH.

(47 Wis. 628.)

Jurisdiction — of person, obtained by fraud — proceedings set aside.

Where a defendant was fraudulently induced to come within the jurisdiction of the court, the service of civil process upon him will be set aside, although the design, when the representations were made, was to arrest him on a criminal charge and although the defendant has made a voluntary general appearance.*

ACTION of libel. Motion to set aside service of process. On coming into the State the defendant was first arrested on a criminal warrant for the libel, and while in custody this action was commenced. The motion was denied below. The opinion states other facts.

*See *Cook v. Brum* (125 Mass. 506), 29 Am. Rep. 259.

Johnson, Rietbrock & Halsey, for appellant.

Joshua Stark and D. G. Rogers, for respondent.

LYON, J. If a person is induced by false representations to come within the jurisdiction of a court for the purpose of obtaining service of process upon him, and process in an action brought against him in such court is there served, it is an abuse of legal process and the fraud being shown, the court will, on motion, set aside the service. This rule is elementary, and has been uniformly enforced in numerous cases both in this country and England. The principle of the rule seems to be that "a valid and lawful act cannot be accomplished by any unlawful means; and whenever such unlawful means are resorted to, the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by these unlawful means to his rights." Per SHAW, C. J., in *Isley v. Nichols*, 12 Pick. 270, 276.

In the present case the plaintiff inveigled the defendant, by artifice and falsehood, to come within the jurisdiction of the court in which the action was brought. The means by which the service of the summons was obtained, being fraudulent, were unlawful. The remedy which the law affords in such a case is to set aside the process.

This remedy is not given upon the ground, that by reason of the fraud, the court did not get jurisdiction of the person of the defendant by the service, but upon the ground that the court will not exercise its jurisdiction in favor of the plaintiff who has obtained service of his summons by unlawful means. When that fact is made to appear — especially if the defendant has been guilty of no laches — the court should vindicate the integrity of its process by setting aside the service and turning the plaintiff out of court as a punishment for his gross fraud.

As already observed, courts have uniformly so proceeded in such cases, and we do not find that any court has ever stopped to inquire, under such circumstances, whether the appearance of the defendant is general or special. Such a case is entirely unlike one in which there has been a failure of proper service of process; for there the failure affects only the defendant, while here the fraud affects the integrity of the process of the court. Surely a general appearance to the action ought not to bar the court from vindicating

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the integrity of its own process, and we have seen no case which gives that effect to a general appearance.

We are of the opinion, therefore, that the ground upon which the learned Circuit judge denied the motion to set aside the service of the summons is untenable, even though the defendant has appeared generally, which we greatly doubt. It is unnecessary, however, to determine the character of the appearance.

It was suggested, but scarcely argued, by the learned counsel for the plaintiff, that because his client committed the fraud for the sole purpose of getting the defendant within this State, so that he might be arrested on criminal process — this action being the result of an afterthought — the service of the summons should be upheld.

The suggestion is hardly worthy of notice. The defendant was within the jurisdiction of the court by means of the fraud of the plaintiff; and no act of his, which that fraud enabled him to accomplish, can be allowed to stand, whether such act was predetermined or not. The court will not permit him to utilize his fraud for any purpose. In *Ex parte Wilson*, 1 Atk. 152, Lord Chancellor HARDWICKE said: "Even at law, where there is an irregular arrest, and an advantage is taken of the irregularity to charge him in custody at the suit of another person, the courts of law will discharge him from both."

We conclude that the court below should have granted the motion.

In addition to those above cited, the following are some of the cases which it is believed sustain the views above expressed: *Snelling v. Watrous*, 2 Psi. 314; *Carpenter v. Spooner*, 2 Sandf. 717; *Williams v. Bacon*, 10 Wend. 636; *Clark v. Metcalf*, 41 Barb. 45; *Goupil v. Simonson*, 3 Abb. Pr. 475; *Bulkley v. Bulkley*, 6 id. 307; *Dunlap v. Cody*, 31 Iowa, 260; s. c., 7 Am. Rep. 129; *Whetstone v. Whetstone*, 31 Iowa, 276; *Wanzer v. Bright*, 52 Ill. 35; *Benninghoff v. Oswell*, 37 How. Pr. 235; *Wells v. Gurney*, 8 B. & C. 769; *Stein v. Valkenhuisen*, Ell., Bl. & Ell. 65; *Luttin v. Benin*, 11 Mod. 50.

BY THE COURT. — Order reversed, and cause remanded with directions to the Circuit Court to vacate and set aside the service of the summons.

Order reversed.

COTTRILL V. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.

(47 Wis. 634.)

Negligence—contributory—locomotive engineer remaining at post.

A locomotive engineer, killed by remaining upon his engine when a collision was imminent, and taking measures to stop his train, is not chargeable with contributory negligence as matter of law, although he might have escaped injury by leaving his post.*

ACTION of negligence resulting in death of plaintiff's intestate, a locomotive engineer in the employ of defendants. The facts sufficiently appear in the opinion. Defendant had judgment below.

Murphey & Goodwin, for appellant.

Melbert B. Cary and *Gregory & Gregory* and *Alfred L. Cary*, for respondent.

ORTON, J. The jury found that the carelessness of the employees of the defendant materially contributed to the injury of the plaintiff; and therefore the following findings relating to the carelessness of the plaintiff need only be considered in determining the correctness or incorrectness of the judgment:

"Did the carelessness of Cottrill, deceased, materially contribute to the result complained of?" "Yes."

"Could Cottrill, after seeing the signal to stop, and reversing his engine, in the exercise of ordinary care and prudence, have gotten off from his locomotive before the collision?" "Yes."

"Could Cottrill have pulled his train out upon the go-out track instead of the come-in track, and switched his cars by so doing?" "Yes."

"If Cottrill had moved his train of 33 cars upon the go-out track at the time he was going out, would he not have been in danger of the train going out on the Prairie du Chien track at 8:50?" "Yes."

These special findings must be presumed to be all the facts found by the jury upon which the carelessness of the appellant was pre-

* See *Troomley v. Cent. Park, etc., R. Co.* (69 N. Y. 183), 25 Am. Rep. 162, and note, 164.

licated ; but if such was not the presumption, there appear to have been no other acts or omissions of the appellant proved which show any carelessness on his part.

Treating these two last findings as still leaving the inference that the deceased was negligent in not taking the go-out track, notwithstanding the danger of a collision on that track with the Prairie du Chien train, as contended by the learned counsel of the respondent — which, to say the least, is very questionable — the only other finding on which the general finding of the carelessness of the deceased was or could be predicated is, that in the exercise of ordinary care and prudence he could have gotten off from the locomotive after the signal to stop, and after reversing his engine, and thus have escaped danger. Did his failure to jump off from the locomotive at the time and under the circumstances constitute such negligence on his part as to prevent a recovery?

It was in evidence that his fireman, on seeing the danger from a collision, jumped off and landed on the ground safely, and that the last he or anybody saw of the deceased he was standing up in front of the boiler, and had the reverse lever in his right hand and the throttle in his left, and while he was in this attitude the collision took place, and by the concussion the tender was driven forward and against the deceased, and confined and crushed him against the hot boiler, and by this means, after great agony and suffering, he was killed.

According to the common appreciation of human conduct and character, this evidence presents an example of heroic bravery and fidelity to duty at the post of danger most praiseworthy and commendable, and an occurrence worthy of lasting record in the book of heroic deeds. The very employment of the locomotive engineer, with its manifold and sudden and unexpected dangers, requires the highest type and best qualities of true manhood, invincible bravery and great integrity; and it is but just to say that as a rule those who are selected for and engaged in this responsible employment possess the full measure of these qualities, and the exceptions are very rare.

They are not men likely to jump off from their locomotive and run away to escape uncertain danger, or to omit any duty in sudden emergencies ; and it is well that they are not. They are placed in charge of one of the mighty forces of nature, held in servitude by the most dangerous and intricate machinery, and great skill, unre-

mitting attention, sleepless vigilance and fearlessness of danger are required to keep them in constant control. Their standard of ordinary care and prudence must be fixed and measured by the dangers and responsibilities of such an employment, and not by the common accidents of less responsible service. The question which should determine their reasonable care, or want of common care, is, how careful and prudent locomotive engineers would ordinarily and commonly act at such a time, in such a place, and under such circumstances, and not how firemen or other employees would or should. To hold as matter of law in this case that the deceased was guilty of a want of ordinary care and prudence, as the engineer in charge of the locomotive and of the train, in not jumping off at this crisis and abandoning his engine, from the mere apprehension of uncertain danger, would make a legal precedent very dangerous to the railway service in life and property, and by which it would be exceedingly difficult, if not impossible, to distinguish the cases and the circumstances in which it would or not be the duty of an engineer to jump off and desert his engine, or to determine in point of time when he should do so, and the necessity or prudence for him to do so.

Can it be said in this case that the deceased had reason to know, or the means of knowing, that by remaining at his post he would be injured, and that by jumping off he would not? Who shall sit in judgment upon this brave engineer to coolly determine the alternative risks and chances which he is compelled to take instantly, with scarcely a moment of time for deliberation in such a terrible emergency? It will not do to establish a rule by which the duty of an engineer in such an emergency may be measured and dictated by cowardice and timidity, and by which his standing at his post and facing danger will be carelessness and negligence. The defense resting upon such a theory in this case cannot be sanctioned, although cases may possibly arise in which even the common prudence of an engineer might require him to leave his engine to escape danger; but such cases will be rare exceptions, and depend upon very peculiar circumstances.

In the case of *Rood v. Am. Ex. Co.*, 46 Wis. 639, this court very recently refused to disturb the verdict of the jury when they found that the driver of a vehicle in the street, in collision with another vehicle, was *careless* because he jumped from his wagon and let go of the lines of his team. The jury may have found the negligence

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of the deceased to have consisted solely in his not jumping off from his engine; and from the two questionable and nearly contradictory findings upon the question whether he might not have taken another track, they probably did so find. Such a verdict did not warrant the judgment.

By THE COURT.—The judgment of the county court is reversed, with costs, and the cause remanded for a new trial.

Judgment reversed.

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AGENCY — *Continued.*

was agreed upon and confirmed, the delay in exercising the election to avoid it operated as a waiver of the right so to do ; and consequently, an instruction to the jury that such right existed at the time of the trial was erroneous. *United States Rolling Stock Company v. Atlantic & Gt. Western Railroad Co.* (Ohio St.), 380.

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3. **Privilege of sepulture.]** The right of burial in a church-yard is a privilege enjoyable only so long as the ground continues a church-yard, and is subject to any right of the church to abandon it; and one who is merely a pew holder, or has relatives buried in the yard, and has no contract relation with the church, cannot maintain the objection that an act of the legislature authorizing the removal of the dead from such church-yard impairs the obligation of a contract. *Id.*

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1. **Delay in delivery — damages.]** If a common carrier is chargeable with knowledge that the article carried is intended for market, and unreasonably delays its delivery, and there is a depreciation in the market value of the article at the place of consignment, between the time it ought to have been delivered and the time it was in fact delivered, such depreciation will ordinarily constitute the measure of damages. *Devereux v. Buckley* (Ohio St.), 842.

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2. Drawing-room car — rights of travellers in.] A passenger on defendant's railway, finding no vacant seats in the ordinary coaches, the seats being occupied either by passengers or their baggage, proceeded to a drawing-room car, owned by a private individual, but forming part of the train, and regularly run with it by contract with the defendant, and there took a seat. When called on for extra fare for that seat, he refused, announcing his readiness to go into the other cars if a seat were provided for him there. Thereupon the porter of the drawing-room car, employed by its owner, attempted to eject him. *Held*, that the defendant was liable for this assault. *Thorpe v. N. Y. C. and H. R. R. Co.* (N. Y.), 325.
3. Failure to receive for carriage caused by armed strikers.] In an action against a common carrier for failure to receive and carry live-stock in pursuance of its agreement, it is a good defense that it was prevented from fulfillment solely by the armed violence of its late employees, whose wages had been reduced, and who had quit work and struck for higher wages. *Pittsburg, Cincinnati and St. Louis R. W. Co. v. Hollowell* (Ind.), 63.
4. Connecting lines — rate of freight.] In the absence of an agreement, a carrier cannot bind other carriers, forming a connecting line with his own, as to the rates of freight; and if such other carriers receive freight from the first carrier under a bill of lading issued by him, they do not impliedly assent to his rates, if the articles shipped are of a different character from those billed, and usually charged at a higher rate, but they may recover the higher rate for transportation. *Sumner v. Southern Railroad Association* (Bart.), 585.

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2. Stipulation that mortgagee may take possession.] A provision in a chattel mortgage that the mortgagee may take possession and sell whenever he deems himself insecure, confers an arbitrary right on the mortgagee, which he may exercise without showing or having any reasonable ground, and the exercise of this right will not be restrained by injunction. *Olney v. Libby* (Wis.), 700.

COMITY.

See MARRIAGE, 180.

COMPOSITION DEED.

See COMPROMISE, 781.

COMPROMISE.

Composition deed—oral agreement to execute.] A creditor, having orally agreed with the debtor and with other creditors to join in a composition deed at a specified rate, and refusing to sign it, such deed having been executed by the others, can recover only the rate fixed in the agreement. *Mellen v. Goldsmith* (Wis.), 781.

CONCEALED WEAPONS.

See CRIMINAL LAW, 551.

CONDITION.

See DEED, 198.

CONSPIRACY.

To slander.] See CRIMINAL LAW, 198.

CONSTITUTIONAL LAW.

1. **Agricultural leases—evasion.]** The constitutional prohibition of agricultural leases for a longer period than twelve years cannot be evaded by the executing of two leases at the same time and for the same consideration, one for eight, and the other for twelve years, the latter to commence at the expiration of the first term; but both are void; and a former lease, surrendered in consideration of the execution of these, is not reinstated. *Clark v. Barnes* (N. Y.), 306.
2. **Destroying private property to prevent conflagration—municipal corporation—liability for act of fire department.]** The destruction of private property by the fire department of a city, to stay a conflagration, is not such an act as will sustain an action for damages against the city at common law, and is not a taking of private property for public use, within the sense of the Constitution; and if any remedy is provided by law it must be pursued in the defined mode. *Keller v. City of Corpus Christi* (Tex.), 613.
3. **Exemption of city by charter for liability for defective condition of streets.]** A provision in a municipal charter, exempting a city from liability for injury to persons or property by work on streets or sidewalks by contractors with the board of public works, in consequence of the condition of such streets or sidewalks, and making such contractors liable therefor, is invalid. *Hincks v. City of Milwaukee* (Wis.), 735.
4. **Impairing contracts—charter of corporation.]** Under a special charter, granted in 1846, the defendant was empowered to "manufacture and sell gas" for the purpose of lighting the city of Columbus. The grant was exclusive for the term of twenty years. The charter contained no provision as to the price to be charged for gas, nor on the subject of meters. *Held*, that the defendant was subject to the provisions of the act of 1867, restricting the price to be charged for the use of meters. *State ex rel. The Attorney-General v. Columbus Gas Light and Coke Company* (Ohio St.), 290.
5. **Statute enlarging exemption from execution.]** The legislature cannot create new subjects of exemption from execution, in addition to those enumerated in the Constitution. *Duncan v. Barnett* (S. C.), 476.

CONTRACT.

1. **Hiring or leasing — liability of owner of premises for injury by defective condition.**] By agreement between D. and C., D. agreed to operate during a specified season a shingle mill, "in the possession and under the control" of C., and to manufacture in a specified manner shingles from logs to be furnished by C., for a specified compensation per thousand, D. to hire and pay the employees and to furnish certain tools and appliances, and to pay for repairs of machinery, not exceeding \$5 in cost, and to load the shingles in a specified manner, at the expense of C. above a specified amount, and until a certain event, and afterward at his own expense; C. to remove refuse from the grounds, to put the mill in running order, and furnish logs to keep the mill in operation; accounts to be taken weekly, and settlements and payments to be made monthly to D. "of the amount due for manufacturing said shingles;" D. to have the use and benefit of certain of the imperfect product unless C. elected to pay him a specified amount for manufacturing the same. During the operation of the mill under this contract, sparks from a defective smoke-stack in the mill set fire to and consumed lumber belonging to the plaintiff. In an action against C. therefor, *held*, (1) that the contract between C. and D. was of hiring and not of lease; (2) the defect having existed when D. took possession, and the mill having been used by him in the ordinary manner, C. was liable, although the strict relation of master and servant did not exist between C. and D. *Whitney v. Clifford* (Wis.), 703.
2. **Illegality — when third party cannot allege.**] If A. receives money from B. for the purpose of paying it to C. upon an agreement between them, he cannot retain it on the ground that the agreement between B. and C. was illegal. *Kiewert v. Rindskopf* (Penn. St.), 451.
3. **To give free pass over railway — measure of damages for breach.**] In consideration of the grant of a right of way over his land, the defendant agreed by parol to furnish the plaintiff for life with a free pass for himself and his family over its road. The pass was given for a while, and then refused. In an action for breach of the contract, *held*, that the measure of damages was the value of such pass, to be approximated as closely as the nature of the case would admit. *Erie & Pittsburgh Railroad Co. v. Douthet* (Penn. St.), 451.
4. **By letter — when complete.**] Defendant offered, by letter sent through the mail, to engage the plaintiff in his employment, stating terms, and asking for a reply by return mail. The plaintiff received the letter on the 22d of March, and next day gave a postal card, accepting the offer, to a boy, to be mailed, but he neglected to mail it until the 25th. *Held*, that defendant was not bound by his offer, nor was he bound after receiving the postal card to notify her that it was not in time, nor was he estopped by his mere subsequent intention to accept her services and an unsuccessful attempt to see her. *Maclay v. Harvey* (Ill.), 85.
5. **Liability of mercantile agency for attorney's default.**] Plaintiffs intrusted a claim for collection to a mercantile and collecting agency, taking a receipt conditioned that the claim was to be transmitted to an attorney for collection or adjustment, at the risk and on the account of the plaintiff,

CONTRACT — *Continued.*

and signing a similar agreement in the defendants' books. *Held*, that these instruments constituted the contract, and the defendants were not liable for the attorney's acts or default, in the absence of proof of gross negligence in selecting him. *Sanger v. Dun* (Wis.), 789.

6. **Sleeping car company — continuous passage.]** The plaintiff purchased of the defendant, a sleeping car company, at Indianapolis, a ticket purporting to entitle him to accommodations in a designated sleeping car, in a berth to be pointed out by the conductor, thence to New York city. A certain berth was accordingly assigned him, and designated on the ticket, but at Pittsburgh the car was detached, and a different and less safe and comfortable berth was offered him in another car, which he declined. In an action for damages for breach of contract, *held*, that he was entitled to a continuous passage in the same car and berth, or in one equally safe, comfortable and convenient; and that it was no defense that the defendant simply rented the cars to the railway companies for the use of passengers. *Pullman Palace Car Company v. Taylor* (Ind.), 57.

Impairing of.] See CONSTITUTIONAL LAW, 890.

Of sale of article of unlawful use.] See SALE, 119.

See WAGER, 81; INFANCY, 153; MUNICIPAL CORPORATION, 687.

CONTRACTOR.

See NEGLIGENCE, 632; TRESPASS, 408.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 94, 413, 784, 796.

CORPORATION.

1. **Director — powers of.]** A note was made by the directors of one corporation, as individuals, and transferred to another corporation, one of the makers being payee and indorser, and president of both corporations. *Held*, that he could not consent for the creditor to any arrangement releasing or impairing the individual liability of himself or his co-directors. *Gallery v. National Exchange Bank of Albion* (Mich.), 149.
2. **Transfer of stock — imputed knowledge through president.]** The infant plaintiffs owned stock in the defendant corporation, standing in the name of "P., guardian." The guardian placed the certificate with a blank indorsement in the hands of D., his counsel, for purposes connected with his trust. D. procured an order of court permitting a sale and investment, and then hypothecated the certificate to the S. Bank as security for a loan for his personal use. H., who was president of the bank, and also of the defendant, with another purchased the stock from the bank, and had it transferred by the defendant to the purchasers. *Held*, that the defendant was chargeable with knowledge of the trust and its beneficiaries, and liable to respond to the plaintiffs for the stock. *Webb v. Graniteville Manufacturing Co.* (S. C.), 479.
3. **Transfer of stock — action to compel.]** Cushman transferred to his wife, the plaintiff, as a gift, certain shares of stock of the defendant cor-

CORPORATION — *Continued.*

poration, by assignment on the back of the certificate, which assignment was witnessed by Beals, an officer of the defendant, and accompanied by a power of attorney authorizing the plaintiff to act for the assignor; subsequently Cushman assigned the same stock to Beals, for a trifling consideration, without the certificate, and Beals, with knowledge of the plaintiff's claim, transferred the stock to himself on the books of the company; the stock was not transferable except on surrender of the certificate; the plaintiff, producing the certificate and power of attorney, demanded from the defendant a transfer of the stock to herself, which was refused, and she brought this suit to compel the transfer. *Held*, that she was entitled to such relief, and was not restricted to an action for damages. *Cushman v. Thayer Manufacturing Jewelry Company* (N. Y.), 815.

Liability of — for negligence of general manager in selecting servants.]
See NEGLIGENCE, 8.

See CONSTITUTIONAL LAW, 890; TAXATION, 533.

COSTS.

Not recoverable against State.] A judgment of the Federal Supreme Court against the State of Wisconsin, for costs in a criminal action, does not constitute a just claim against the State within the statute conferring on the State courts jurisdiction of actions against the State. *Noyes v. State* (Wis.), 710.

COUNTY.

See MUNICIPAL CORPORATION, 561.

CRIMINAL LAW.

1. **Burglary — opening transom.]** Pushing open a closed but unfastened transom, that swings horizontally on hinges over an outer door of a dwelling-house, and entering thereat, constitutes burglary. *Timmons v. State* (Ohio St.), 876.
2. **— mill.]** At common law a mill, in which no one sleeps, seventy-five yards from the owner's dwelling-house, separated therefrom by a public road, and not proved to be appurtenant to the dwelling-house, was not the subject of burglary, and is not under a statute covering houses, outhouses, buildings, sheds and erections, within two hundred yards of and appurtenant to such dwelling-house. *State v. Sampson* (S. C.), 513.
3. **Concealed weapons — constitutionality.]** A law prohibiting the carrying of an army pistol except in the hand is constitutional. *State v. Wilburn* (Bart.), 551.
4. **Conspiracy to slander.]** A conspiracy to slander is indictable. *State v. Hickling* (Vroom), 198.
5. **Construction of statute — "insulting words toward a female relation."]** A statute provided that "insulting words toward a female relation" should be "adequate cause" to reduce a homicide from murder to manslaughter. *Held*, that insulting words of and concerning such female relation who

CRIMINAL LAW — *Continued.*

- was not present were within the protection of the statute. *Hudson v. State* (Tex. Ct. App.), 593.
6. **Double punishment — ordinance and statute.]** Conviction and punishment under a city ordinance for keeping a gaming house is no bar to a prosecution for the same offense by the State. *Greenwood v. State* (Bart.), 539.
 7. **Evidence — burden of proof as to non-age.]** Where by law the death penalty cannot be inflicted for a given offense committed by a person of less than seventeen years of age, the burden of proof showing his non-age is on the defendant. *Ake v. State* (Tex. Ct. App.), 586.
 8. **— confidential communications by prisoner to his attorney.]** Where the accused in a criminal trial becomes a witness in his own behalf, he cannot be compelled, on cross-examination, to disclose the confidential communications between himself and his attorney, nor can such disclosures be required of the attorney without the consent of the accused. *Duttenhofer v. State* (Ohio St.), 362.
 9. **— of feigned accomplice.]** On a trial for felony the principal State's witness claimed to have acquired his knowledge of the offense in the character of a detective and feigned accomplice. *Held*, that the question of his real guilt was properly left to the jury, with instructions as to the nature and credibility of the testimony of accomplices. *Wright v. State* (Tex. Ct. App.), 599.
 10. **— footprints — compelling prisoner to make.]** On the trial of an indictment for murder, the prosecution was allowed to prove that the examining magistrate had compelled the prisoner to make his footprints in an ash heap, and they corresponded with footprints found at the scene of the crime. *Held*, no error. *Walker v. State* (Tex. Ct. App.), 595.
 11. **— impeachment of prisoner.]** On a trial for burglary it is incompetent to ask the prisoner on cross-examination if he had not been arrested for bigamy, as such evidence does not legitimately tend to impair his credibility. *People v. Crapo* (N. Y.), 302.
 12. **— insanity — inquisition of lunacy.]** On the trial of an indictment the defendant relied on insanity as a defense, and offered in evidence a record from the probate court showing that four years previous to the commission of the alleged crime an inquest had been held in that court, and that he had been adjudged insane and confined in an asylum. *Held*, that the evidence was admissible. *Wheeler v. State* (Ohio St.), 373.
 13. **— witness' testimony on preliminary examination.]** Testimony given by a witness on a preliminary examination before a committing magistrate in a criminal case where he was confronted with the accused and subjected to cross-examination, may be introduced by either party on the subsequent trial, where the witness is dead, cannot be found, or absents himself at the instance of the opposite party; but not where it is merely shown that he is out of the State. *Sullivan v. State* (Tex. Ct. App.), 580.
 14. **Former acquittal — murder of unborn child — abortion.]** To an indictment for an attempt to produce a miscarriage, an acquittal on an indictment for

CRIMINAL LAW — *Continued.*

murder of an unborn child by an attempt to produce a miscarriage is no bar. *State v. Elder* (Ind.), 69.

15. — insanity — frenzy.] On the trial of an indictment for murder, the court instructed the jury that "frenzy arising solely from the passions of anger and jealousy, no matter how furious, is not insanity. *Held* correct. *Guetig v. State* (Ind.) 99.
16. — burden of proof of.] On the trial of an indictment, where insanity was relied on as a defense, the court instructed the jury that "the law presumes that a man is of sound mind until there is some evidence to the contrary. * * * An accused is entitled to an acquittal if the evidence engenders a reasonable doubt as to the mental capacity at the time the alleged offense is charged to have been committed. Evidence * * tending to rebut the presumption of sanity need not, to entitle the defendant to an acquittal, preponderate in favor of the accused. It will be sufficient if it raises in your minds a reasonable doubt." *Held*, correct. *Id.*
17. Medical opinions.] An instruction that while the jury should consider the opinions of medical experts in connection with all the other evidence, they were not bound to act thereon to the entire exclusion of other testimony, but should determine the question of sanity from all the evidence; and that such an opinion "based upon a hypothesis" which is "wholly incorrectly assumed, or incorrect in its material facts to such an extent as to impair the value of the opinion, is of little or no weight;" *Held*, correct. *Id.*
18. Indictment.] An indictment charging the carrying of an army pistol privately and concealed, and not openly in the hands, is not bad for omitting the statutory words, "about his person." *State v. Wilburn*, (Bart.), 551.
19. Intent — when criminal intent not necessary.] Where a statute in general terms makes an act indictable, a criminal intent need not be shown in one indicted under it, unless the purpose to require it can be discovered in the language employed. *Halsted v. State* (Vroom), 247.
20. Opinions of jurors.] Under a statute of Indiana, jurors who have read the evidence on a former trial of the same indictment as reported in newspapers, and formed and expressed opinions, derived therefrom, on the merits of the case, which it would require evidence to remove, but which would readily yield to evidence, are competent. *Guetig v. State* (Ind.), 99.
21. Larceny — paraphernalia.] While a married woman may acquire title to articles of apparel by gift from her husband, yet her mere use and enjoyment of such articles purchased by her husband does not give her title thereto as her separate property; and on an indictment for stealing such articles, laying them as the property of the husband, the question of title is for the jury. *State v. Pitts* (S. C.), 508.
22. Marriage — miscegenation.] A white man and a colored woman, married according to the forms of law in Mississippi, may be indicted for living together as husband and wife, under the laws of Tennessee. *State v. Bell* (Bart.), 549.
23. — prohibited, legally contracted in another State.] K., a negro

CRIMINAL LAW — *Continued.*

- man, and M., a white woman, domiciled in Virginia, went to the District of Columbia and were there legally and regularly married, and after remaining there ten days returned to their home in Virginia, and continued to reside there as husband and wife. The law of Virginia prohibits marriages between white persons and negroes. *Held*, that the parties were liable to indictment in Virginia for lewd and lascivious cohabitation. *Kinney v. Commonwealth* (Gratt.), 690.
24. **Misdemeanor — evasion of statute.]** The defendant was indicted under a statute making it a misdemeanor to employ female waiters in a drinking saloon. She had employed such waiters before the passage of the act, and after the enactment she discharged them and entered into partnership with them. *Held*, an evasion of the statute for which the indictment would lie. *Walter v. Commonwealth* (Penn. St.), 429.
25. **Nuisance — keeping open barber shop on Sunday.]** Keeping open a barber shop on Sunday is not an indictable nuisance. *State v. Lorry* (Bart.), 555.
26. **Perjury — disqualification of notary administering oath.]** Perjury cannot be predicated of an affidavit sworn before a notary public professing to act in the city of New York, but who was a non-resident of the State at that time and at the time of his appointment. *Lambert v. People* (N. Y.), 393.
27. **Rape — consent — imbecility.]** One may be convicted of rape on a woman who failed to resist because of imbecility. *State v. Atherton* (Iowa), 184.
28. **— assault with intent.]** On an indictment for rape, if consent is shown, there may be a conviction of assault with intent to commit rape, if there was force sufficient to indicate that intent before consent was given. *Id.*
29. **— fictitious marriage.]** Sexual connection with a woman of weak intellect by means of a fictitious marriage does not constitute rape. *Bloodworth v. State* (Bart.), 546.
30. **Right to bail in capital cases — "proof evident."]** Under the constitutional provision allowing bail in capital cases except where "the proof is evident," bail will be denied if the evidence adduced on the application would sustain a verdict of murder in the first degree, but otherwise bail will be granted. *Ex parte Foster* (Tex. Ct. App.), 577.
31. **Testimony of accomplice — subsequent trial of accomplice.]** Where an accomplice has confessed, and his testimony has been received and used by the prosecution upon the trial of the other defendant, who has been convicted, he has an equitable claim to pardon, or the court may enter a *nolle prosequi*, but he is not entitled to discharge as a matter of right. *State v. Graham* (Vroom), 174.
32. **Trial — jurors not understanding English — waiver of objection.]** The objection that jurors on a criminal trial did not understand the English language is waived if not specifically taken at the trial. *Yanes v. State* (Tex. Ct. App.), 591.
33. **— Limiting arguments of counsel.]** On the trial of an indictment

CRIMINAL LAW — *Continued.*

for larceny where six witnesses were examined on behalf of the people and three on behalf of the defendant, it was *held* error for the court to limit the arguments of counsel to five minutes each. *White v. The People* (Ill.), 12.

34. — voluntary absence of prisoner at rendition of verdict.] A bailed prisoner on trial for larceny voluntarily left the court room during the deliberation of the jury, and on the coming in of the jury, being called and not appearing, a verdict of guilty was received and sentence was pronounced in his absence. *Held*, no error. *Lynch v. Commonwealth* (Penn. St.), 445.
35. Witness — husband and wife.] In a prosecution of a wife for an assault upon her husband, he is a competent witness for the State. *Whipp v. State* (Ohio St.), 359.
36. — physician — post-mortem examination.] On a criminal trial it seems that a physician, who has made a *post-mortem* examination, may be compelled to testify concerning its results and his opinions derived therefrom. *Summers v. State* (Tex. Ct. App.), 573.

CUSTOM.

See EVIDENCE, 78.

DAMAGES.

1. Measure — for conversion or breach of contract to sell goods.] In an action for conversion or breach of contract to deliver goods, unless the plaintiff has been deprived of some special use of the goods, anticipated by the defendants, or is entitled to exemplary damages, the measure of damages is the value of the goods at the time and place of conversion or when and where delivery was due, with interest to the time of the trial. *Ingram v. Rankin* (Wis.), 762.
 2. Penalty or liquidated — attorney's fee in mortgage.] A stipulation, in a mortgage, for an attorney's fee for collection, is a penalty rather than liquidated damages, and may be reduced in the discretion of the court. *Daly v. Maitland* (Penn. St.), 457.
- Measure of, for breach of contract to give free railway pass.] *See* CONTRACT, 451.
- against carrier, for delay of delivery.] *See* CARRIER, 342.

DECEIT.

Action for, against representatives of deceased.] *See* ACTION, 186.

DEED.

1. Delivery — escrow.] A deed cannot be delivered in escrow to the grantee or obligee. A guardian's bond, conditioned for execution by three sureties, was executed by two, who left it with the surrogate, instructing the guardian to have it executed by the third, which he promised to do. *Held*, that this was not a delivery upon condition, and therefore not an

DEED — *Continued.*

escrow, and the two were liable although the third did not execute. *Ordinary of New Jersey v. Thatcher* (Vroom), 225.

2. **Reservation to use of grantor — estate.]** A deed of land to A., her heirs and assigns forever, in consideration of love, good will and affection, reserving the use of the lands during the grantor's natural life, conveys the fee *in presenti*, subject to the life estate. *Cribb v. Rogers* (S. C.), 511.
3. **Reservation of timber — condition.]** A deed of lands reserved the timber, the grantee stipulating that the grantor should have two years to remove it. *Held*, that it might be removed after that time. *Irons v. Webb* (Vroom), 193.
4. **"Under and subject" to mortgage.]** Where lands are granted "under and subject" to a mortgage, and there is no express agreement by the grantee to pay the incumbrance, and there are no circumstances from which such an agreement can be implied, the words amount simply to a covenant of indemnity. *Moore's Appeal* (Penn. St.), 469.

DELIVERY.

See DEED, 225.

DIRECTOR.

Loan to, by National bank.] *See* NATIONAL BANK, 364.

See CORPORATION, 149.

DISSOLUTION.

Of partnership.] *See* JUDGMENT, 673.

DIVORCE.

Repeal of laws of, effect on action.] *See* STATUTE, 506

See MARRIAGE, 274, 529.

DRAWING-ROOM CAR.

Rights of travellers in.] *See* CARRIER, 325.

DURESS.

See MARRIAGE, 180, 529.

ESCROW.

See DEED, 225.

ESTOPPEL.

Of married women.] *See* MARRIAGE, 22.

See FIXTURES, 170 ; INSURANCE, 290.

EVIDENCE.

1. **Declarations.]** In action by a wife for enticing away her husband, declarations of her husband as to the cause of his abandonment are inadmissible. *Westlake v. Westlake* (Ohio St.), 397.

EVIDENCE — *Continued.*

2. Parol, to attach condition to bill of exchange.] L., being indebted to the firm of J. M. S. & Co., gave to M., who acted for the firm, a draft for the amount on O., who was indebted to L. O. accepted the draft but it was not paid. In an action on behalf of J. M. S. & Co. against L. on the draft, *held*, that parol evidence was not admissible to show that M. agreed, at the time of the giving of the draft, that if it was accepted it should be a discharge of all liability of L. on the debt or on the draft. *Martin's Executrix v. Lewis' Executor* (Gratt.), 682.
 3. Judicial notice of minor geographical division.] A court will not take judicial notice that a particular locality is or is not within a particular county. *Boston v. State* (Tex. Ct. App.), 575.
 4. Seduction — previous unchastity.] In an action brought under a statute for damages for the plaintiff's own seduction, evidence of the plaintiff's previous unchastity, although unknown to the defendant or the public, is admissible in mitigation of damages. *Love v. Masoner* (Bart.), 522.
 5. — plaintiff's privilege as witness.] Fornication not being a penal offense, the plaintiff, examined as a witness on her own behalf in an action for her own seduction, may be required to testify concerning previous alleged acts of unchastity with others. *Id.*
 6. Subscribing witness — party.] The rule that the execution of a writing must be proved by the subscribing witness is not modified by the recent legislation making parties competent witnesses. *Henly v. Henning* (Bart.), 568.
 7. Want of mental capacity and undue influence — family transactions.] On a trial of the validity of a will, opposed on the ground of want of mental capacity and undue influence by a second wife, it is error to exclude evidence of occurrences in the testator's family within a year before the execution of the will, showing the private history of the family and the testator's relations with his wife, and the means employed by her to wear his affections from the step-children and obtain benefits for herself. *Reynolds v. Adams* (Ill.), 13.
 8. — declarations of testator.] The declarations of a testator at or about the time of the execution of the will are admissible in a contest of the will to show his mental condition. *Id.*
 9. Of writing of deceased marksman when attesting witnesses are dead.] A deed, executed by a grantor making her mark, she and the attesting witnesses being dead, is well proved by evidence of the handwriting of the attesting witnesses, with other confirmatory evidence, and proof of the grantor's signature is not necessary. *Lyons v. Holmes* (S. C.), 483.
- Burden of proof of non-age.] *See CRIMINAL LAW*, 586.
- Confidential communications by prisoner to his attorney.] *See CRIMINAL LAW*, 362.
- Custom.] *See INSURANCE*, 78.
- Of feigned accomplice.] *See CRIMINAL LAW*, 599.
- On preliminary examination.] *See CRIMINAL LAW*, 580.

EVIDENCE — *Continued.*

Compelling prisoner to make tracks.] *See* CRIMINAL LAW, 595.

See CRIMINAL LAW, 802.

EXECUTION.

See TAX WARRANT, 301.

EXEMPTION.

"Head of a family."] Under a statute exempting property from distress, a widow, keeping a boarding-house, with a female friend residing with her, and female servants, besides the boarders, is the "head of a family."
Race v. Oldridge (Ill.), 27.

Of city, by charter, for liability for defective street.] *See* CONSTITUTIONAL LAW, 735.

Enlargement of.] *See* CONSTITUTIONAL LAW, 476.

From taxation.] *See* TAXATION, 530.

EXTRADITION.

1. **Revocation of warrant.]** If the governor of one State makes a requisition on the governor of another State for the surrender of a fugitive from justice, and the case is shown to be within the provisions of the Constitution of the United States and the act of Congress on the subject no discretion is vested in the latter governor, but it is his imperative duty to issue his warrant of extradition. *Work v. Corrington* (Ohio St.), 345.
2. **—.]** If a warrant for the surrender of a fugitive from justice is obtained in a case in which it should not have been issued, the governor may revoke it, whether issued by himself or his predecessor. *Id.*
3. **—.]** Where such warrant has been revoked by the governor, no inquiry will be made, in a proceeding on *habeas corpus* on behalf of the alleged fugitive, as to the grounds of such revocation, although at the time of the revocation, the fugitive may have been in custody of the agent of the demanding State. *Id.*
4. **Who is a fugitive.]** A citizen and resident of one State, charged in a requisition with the constructive commission of crime in another State, from which in fact he has never fled, is not a fugitive from justice, and the determination of the governor as to the sufficiency of the facts alleged is not conclusive. *Jones v. Leonard* (Iowa), 116.

FIXTURES.

1. **Estoppel of owner — agreement to replace.]** A. put up salt-well boring machinery in a house on the land of B., under an agreement for the ownership of the land and business, which was not carried out. B. sold the land to C. A. removed part and was removing the rest of the machinery, against C.'s objection, when they entered into a contract by which A. agreed that if C. would let him remove it, to bore a well elsewhere, he would afterward return and replace it as before. *Held*, that the machinery did not pass by the conveyance, and the agreement did not bind A. *Bewick v. Fletcher* (Mich.), 170.

FIXTURES — *Continued.*

2. Title to, as between lessee and mortgagee.] A lessee, under a provision in the lease allowing him so to do, purchased the premises from his lessor. The premises were sold subject to a mortgage by the lessor. The lessee before the deed to him had placed machinery on the premises. *Held*, that such machinery did not, by operation of law, become part of the realty, as between the lessee and the mortgagee, although so affixed as to be realty as between vendor and vendee. *Globe Marble Mills Company v. Quinn* (N. Y.), 259.

FRAUD.

- Sale—representations in good faith—vendee's laches.] In the absence of artifice, a sale will not be set aside on the ground that it was procured by false and fraudulent representations, if the vendor believed them true, and the vendee had equal opportunity and means for ascertaining their falsity. *Mamlock v. Fairbanks* (Wis.), 716.

Jurisdiction of person obtained by.] *See* JURISDICTION, 793.

See INSURANCE, 290.

FRENZY.

See CRIMINAL LAW, 99.

FUGITIVE.

See EXTRADITION, 116.

GUARANTY.

- False recommendation.] If one represents as true that which he knows to be false, in such a way and under such circumstances as to induce a reasonable man to believe that it is true, and it is meant to be acted on, and the person to whom the representation has been made, believing it to be true, acts upon the faith of it, and by so acting sustains damage, such representation is fraudulent, and will sustain an action by the party damaged. *Wynne v. Allen* (Bart.), 562.

GUARDIAN AND WARD.

- Sale of ward's bond and mortgage — when not warranted.] A guardian sold his ward's bond and mortgage, the purchaser paying in part by applying a debt past due to him from the guardian personally. The guardian became insolvent, and failed to account, and his bond became worthless. There was no evidence of the proper application of the purchase-money. The purchaser knew of the trust. *Held*, that the purchaser got no legal title, and equity would not uphold the transfer under such circumstances. *McDuffie v. McIntyre* (S. C.), 500.

HANDWRITING.

- Proof of, of deceased marksman.] *See* EVIDENCE, 433.

HUSBAND AND WIFE.

See MARRIAGE.

HIGHWAY.

See MUNICIPAL CORPORATION, 236.

ICE.

Im pond.] See REAL PROPERTY, 160.

INDORSEMENT.

See NEGOTIABLE INSTRUMENT.

INFANCY.

Repudiation — executed contract for services.] An infant cannot repudiate his executed contract to render services at a stipulated price, and recover *quantum meruit*, where the other party did not know of his infancy, and the contract was reasonable. *Spicer v. Earl* (Mich.), 152.

Presumption as to capacity to see and avoid danger.] *See* NEGLIGENCE, 418.

See NEGLIGENCE, 472.

INNKEEPER.

Letting public hall.] *See* NEGLIGENCE, 282.

INQUISITION.

Of lunacy.] *See* CRIMINAL LAW, 372.

INSANITY.

Burden of proof of.] *See* CRIMINAL LAW, 99.

INSURANCE

1. Action by one for insurance on his goods recovered by another.] One who effected insurance covering his own goods and goods stored with him, and collected the insurance money, is liable to the owner of such stored goods for his share, although he did not request or know of the insurance, and did not ratify it before the payment of the loss. *Snow v. Carr* (Ala.), 8.

2. Condition — waiver.] A fire policy provided that if the insured property should be sold, or the interest of the assured was not truly stated, the policy should be void; that nothing but a distinct specific agreement indorsed on the policy should be construed a waiver; and that any person who procured the insurance should be deemed the agent of the insured and not of the company, in all transactions concerning the insurance. The policy was procured through H., the duly authorized agent of the company, who countersigned it as defendant's agent, and it was three times renewed, each receipt, signed by the president and secretary, providing that it was not valid unless countersigned by the defendant's duly authorized agent, and being signed by H. as agent, he receiving the pre-

INSURANCE — *Continued.*

- premiums and transmitting them to the defendant. On the third renewal the plaintiff informed H. that he had sold the premises and taken a mortgage on them. H. said he would "make it all right." In an action on the policy, *held*, that the defendant was bound by H.'s acts, that the conditions were waived, and the policy was in force. *Whited v. Germania Fire Insurance Company* (N. Y.), 830.
3. **Fraudulent representations of insurer — estoppel.]** The defendant advertised and represented that its patrons could be insured at half the expense of insuring in other companies, by paying half the premiums in cash and giving notes for the other half, the dividends always paying the notes. The dividends never had paid the notes, but generally fell far short, as the managers knew. The plaintiff procured an endowment policy for \$500 payable in five years, paying half cash and giving notes for the other half. Only one small dividend was made during the term. At the end of the five years the plaintiff demanded the \$500, but the defendant refused to pay more than the difference after deducting the amount due on the notes. *Held*, that an action for fraud was maintainable, that the plaintiff was not estopped by the delay, and that the measure of recovery would be the money paid and interest. *Rohrbaugh v. Knickerbocker Life Insurance Co.* (N. Y.), 290.
4. **Insanity — brain disease.]** One who has received an injury on the head in childhood, resulting in hardening of the brain, and a weakening of the mental powers in mature age, continuing and increasing till death, and necessitating confinement in an asylum for quiet and treatment, is not afflicted with insanity, within the meaning of an application for life insurance, it appearing that he knew what was going on, and it not appearing that he was subject to delusions or acted irrationally. *Newton v. Mutual Benefit Life Ins. Co.* (N. Y.), 835.
5. **Notice of loss — to whom to be given.]** Where a policy of fire insurance requires that the insured shall give immediate notice in case of loss, and the loss is made payable to a mortgagee, notice by the mortgagee and the assignee of all the interest of the insured, to the local agent, is valid, if knowledge of it comes to the general agent. *Watertown Fire Insurance Co. v. Grover & Baker Sewing Machine Company* (Mich.), 146.
6. **Warranty — construction of.]** An application for fire insurance contained a statement that "the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk, and the same is hereby made a condition of the insurance and a warranty on the part of the assured;" and the policy made the application a part of it and a warranty. *Held*, that the warranty was only such as was described in the application, and embraced only such statements as were material to the risk and known to the insured to be false. *Redman v. Hartford Fire Insurance Company* (Wis.), 751.
7. **Wharf-boat — lost by ice.]** Defendant issued a policy to plaintiff "against loss or damage by fire, * * on his wharf-boat, tackle and apparel lying

INSURANCE — *Continued.*

at the wharf of the city of Evansville, Indiana, * * and to receive, discharge and store freight, hazardous, extra-hazardous, and specially hazardous," providing "that the loss, if any, shall be adjusted according to the conditions herein contained, and those hereto attached." The conditions were as follows: "Touching the adventures and perils which the said insurance company is contented to bear and take upon itself in this voyage, they are of the seas, lakes, rivers, canals, fires, jettisons, rovers and assailing thieves." *Held*, that the company was liable for the destruction of the boat by floating ice. *Franklin Insurance Company of Indianapolis v. Humphrey* (Ind.), 78.

8. — *evidence — custom.*] In such action evidence of a custom at Evansville of removing such boats to a neighboring ice harbor, for safety during the season of running ice; and of notice by the insurer to the insured, so to remove the property, an offer to accept the risk thereby incurred, and that such removal would have been safe, *held* inadmissible. *Id.*

INTENT.

See CRIMINAL LAW, 247.

JUDGE.

1. *Civil liability for judicial act.*] Justices of the peace, *ex officio* county court, are not liable in a civil action for an alleged wrongful and malicious refusal to approve a collector's bond. *Rains v. Simpson* (Tex.), 609.
2. *Jurisdiction — appointing himself referee.*] *It seems*, a judge cannot appoint himself referee, even by consent. *Woodin v. Phoenix* (Mich.), 172.

JUDGMENT.

Of another State — impeachment of, for want of jurisdiction — partnership — dissolution.] A judgment rendered in another State against all the former members of a dissolved partnership will not personally bind one of the partners who was not served with process, and did not appear, although by the law of that State such judgment is enforceable against the joint property; and in an action on such judgment here, such partner may show that he was not served and did not appear, although the record states that he was summoned and appeared. *Bowler v. Huston* (Gratt.), 678.

JUDICIAL NOTICE.

See EVIDENCE, 575.

JURISDICTION.

1. *Administration on estate of living persons.*] Where a petition for letters of administration was presented to the clerk of the surrogate, in the surrogate's absence, and the clerk filled up a blank appointment signed and left with him by the surrogate, without evidence outside the petition of the death of the alleged decedent, the surrogate having no knowledge of and never acting upon the petition, the letters are void, and do not protect a debtor who in good faith pays his debt to the administrator named therein. *Roderigas v. East River Savings Institution* (N. Y.), 309.

JURISDICTION — *Continued.*

2. Of person, obtained by fraud — proceedings set aside.] Where a defendant was fraudulently induced to come within the jurisdiction of the court, the service of civil process upon him will be set aside, although the design, when the representations were made, was to arrest him on a criminal charge, and although the defendant has made a voluntary general appearance. *Townsend v. Smith* (Wis.), 603.

See JUDGE, 173.

JURORS.

Not understanding English.] See CRIMINAL LAW, 591.

Opinions of.] See CRIMINAL LAW, 99.

LACHES.

See AGENCY, 880.

LARCENY.

See CRIMINAL LAW, 508.

LEAP YEAR.

See STATUTE, 86.

LEASE.

Agricultural.] See CONSTITUTIONAL LAW, 306.

LETTER.

Contract by.] See CONTRACT, 85.

LIVERY-STABLE.

See NUISANCE, 138.

MANDAMUS.

To permit inspection of public records.] A citizen who desires to inspect recommendations filed with the collector of taxes as the basis for issuing pending liquor licenses, in order to ascertain whether the provisions of the law have been observed, and to secure obedience to the law, is entitled to *mandamus* to compel the exhibition of such letters. *Ferry v. Williams* (Vroom), 219.

MARRIAGE.

1. Action by wife for procuring her husband to abandon her.] A wife may maintain an action for the loss of the society and companionship of her husband, against one who wrongfully and maliciously induces and procures her husband to abandon or send her away. *Westlake v. Westlake* (Ohio St.), 397.

2. Ante-nuptial settlement — power of wife to convey under.] C, a tobacco manufacturer, by ante-nuptial contract, conveyed his real and personal

MARRIAGE—*Continued.*

property, including his dwelling-house, in trust for his intended wife for life, with remainder to their children, for the expressed purpose of providing a home for her and the children. After marriage, conducting his business in the name of the wife, for the purpose of borrowing money for the business, he and the wife and the trustee joined in a conveyance of the dwelling-house to a trustee for that purpose. *Held*, void as to the wife. *Bank of Greensboro' v. Chambers* (Gratt.), 661.

2. **Charge of wife's separate property by note—comity.]** Under a statute of Illinois, providing that "contracts may be made and liabilities incurred by a wife, and the same enforced against her in the same manner as if she were unmarried," a wife may bind her separate property by a note executed there as surety for her husband, and it will be enforced in New Jersey, although there is no similar provision in the latter State. *Wright v. Remington* (Vroom), 180.
4. **Duress.]** A threat by a husband, conveyed through a payee, that he will poison himself unless his wife signs a note as surety for him, by means whereof she is induced so to sign, does not amount to duress such as will avoid her note. *Id.*
5. **Cohabitation—presumption.]** Cohabitation, originally illicit, is presumed so to continue, unless a subsequent actual contract of marriage is proved. *Williams v. Williams* (Wis.), 22.
6. **Crops raised by husband on wife's land—creditors.]** Crops raised on a wife's land by a husband's labor are not liable for his debts, although she bought the land on credit and was engaged in paying for it by the profits of the crops so raised. *Dayton v. Walsh* (Wis.), 757.
7. **Divorce—duress.]** A marriage procured by duress is voidable, although this is not among the statutory causes for divorce. *Willard v. Willard* (Bart.), 529.
8. **—in another State—jurisdiction.]** On the trial of an indictment for bigamy, the defendant pleaded a divorce obtained by the former wife in Ohio. *Held*, that a court of another State cannot grant an absolute divorce as against one domiciled and actually abiding in this State pending those proceedings, and not personally served with process, nor notified, nor voluntarily appearing. *People v. Baker* (N. Y.), 274.
9. **Estoppel of married woman.]** A married woman held in her maiden name real estate which belonged to her before marriage. Representing herself as a widow and concealing her marriage, she applied for a loan thereon, and executed a mortgage therefor in her maiden name, without her husband joining in it, the other party being ignorant of her marriage. *Held*, that in equity she could not avoid the mortgage and retain the money. *Patterson v. Lawrence* (Ill.), 22.
10. **Liability of husband for expenses of wife's burial.]** A husband and his adult son went together to an undertaker and together ordered a coffin and carriages for the funeral of the wife and mother. Nothing was said as to who was to be charged. *Held*, that the husband was liable. *Sears v. Giddy* (Mich.), 168.

MARRIAGE—*Continued.*

11. — of married woman for necessaries.] Under a statute enabling married women to contract in the same manner as if single, a married woman, living with her husband, can only be made liable for necessities sold to her and on her credit, where she expressly contracts to pay therefor out of her separate estate, or the circumstances show an intention on her part to assume the liability exclusive of the husband. *Wilson v. Herbert* (Vroom), 243.
 12. Prohibited marriage legally contracted in another State.] K., a negro man, and M., a white woman, domiciled in Virginia, went to the District of Columbia and were there legally and regularly married, and after remaining there ten days returned to their home in Virginia, and continued to reside there as husband and wife. The law of Virginia prohibits marriages between white persons and negroes. *Held*, that the parties were liable to indictment in Virginia for lewd and lascivious cohabitation. *Kinney v. Commonwealth* (Gratt.), 690.
- Fictitious.] *See* CRIMINAL LAW, 546.
- Miscegenation.] *See* CRIMINAL LAW, 549.

MARRIED WOMAN.

See MARRIAGE.

MASTER AND SERVANT.

1. Action — negligence — servant against co-servant.] An action will lie in favor of one employee against a co-employee for physical injury caused to the former by the latter's negligence in the same undertaking. *Hinds v. Overacker* (Ind.), 114.
2. Respondeat superior.] A master is not liable for an injury sustained by one of his employees through the negligence of the foreman having charge and control of him and others, unless the foreman had power to discharge employees, or the master was negligent in employing him. *Peterson v. Whitebreast Coal and Mining Co.* (Iowa), 143.
3. Stevedore — independent employment.] A steamship company employed a stevedore to load and unload its vessels at New Orleans. The stevedore employed his own men, machinery, and planks, and had charge of the work to the exclusion of the master and crew. A watchman employed on one of the steamships, while it was being loaded, stepped on a plank used and placed by the stevedore or his men, and received injury from its tilting. *Held*, that the questions whether the stevedore was a servant or contractor and whether the plaintiff was a fellow-servant, were for the jury. *Hass v. Philadelphia and Southern Mail Steamship Co.* (Penn. St.), 462.

See TRESPASS, 406.

MECHANICS' LIEN.

1. County bridge.] A mechanics' lien will not attach to a county bridge. *Loring v. Small* (Iowa), 136.

MECHANICS' LIEN — *Continued.*

- 2 "Labor"—supervising architect.] Under a mechanics' lien act, giving a lien to any person who shall perform labor, etc., a supervising architect may enforce a lien. *Stryker v. Cassidy* (N. Y.), 262.

MERCANTILE AGENCY.

See CONTRACT, 789.

MINES.

Support of surface.] A., the owner of lands in fee, granted to B. "the sole right to dig, mine, use or sell clay situated on" such land, and also the right to dig and mine coal on the same land. Afterward he granted to C. the right to have, hold and possess all the coal, iron, lead, and all other productions, vegetable and mineral, "under the surface, except the clay and stone heretofore let" to B. The assignee of B., in mining under a mine dug by the assignee of C., neglected to leave sufficient supports for the ground overhead, which sank and destroyed the upper mine. *Held*, that the owner of the lower mine was liable in damages to the owner of the upper. *Yandee v. Wright* (Ind.), 109.

MISCEGENATION.

See CRIMINAL LAW, 549.

MORTGAGE.

Assumption of.] *See* DEED, 469.

See CHATTEL MORTGAGE.

MUNICIPAL CORPORATION.

1. **Contract—ultra vires.]** A city charter provided for the exercise by ordinance of the power to employ legal counsel for the assistance of the common council, etc. No such ordinance was passed, but the mayor employed attorneys to give an opinion regarding municipal matters, which was read at a meeting of the common council and acted on. *Held*, that the attorneys could not recover of the city for their services in giving the opinion. *City of Bryan v. Page* (Tex.), 687.
2. **County — failure to repair bridge.]** In the absence of statute a county is not liable for damage by failure to repair its public bridges. *Wood v. Tipton County* (Bart.), 561.
3. **Inclosure of street for private use.]** A common council of a city have no right to give permission to a citizen to inclose for private use any part of a public street, except by statutory proceedings to alter or diminish the width thereof, and such an encroachment will not ripen into right by twenty years' use. *St. Vincent Orphan Asylum v. City of Troy* (N. Y.), 286.
4. **Liability for damage to abutting owner by change of grade of street.]** A municipal corporation is liable in damages to an abutting lot-owner for injury to his land which has been improved with reference to grade in a

MUNICIPAL CORPORATION — *Continued.*

street established under circumstances denoting its permanency ; or where the street not being graded, the lot-owner improves his lot with reference to a reasonable grade subsequently to be established, and which being subsequently established, is thereafter changed to his detriment ; but the reasonableness of the grade is to be determined by the circumstances existing at the time when it is established and not by those existing when the lot is improved. *City of Akron v. Chamberlain Company* (Ohio St.), 867.

5. **Liability for destruction of buildings to prevent fire — statutory construction.]** Defendant's charter authorized its officers to blow up any building on fire, or any other building which it might deem hazardous, and gave the owners a right to damages therefor. The officers, to arrest a fire, blew up a building, and by reason of the explosion the plaintiff's building on the opposite side of the street was shattered. *Held*, that he had no cause of action, although the injury was the natural and probable result of the explosion. *People ex rel. Brisbane v. City of Buffalo* (N. Y.), 837.
6. **Negligence — insufficient capacity of sewers.]** A municipal corporation is not liable for damage caused by the accumulation of surface water on city lots, when owing solely to the insufficient size of sewers, which are not defective in construction nor out of repair. *Fair v. City of Philadelphia* (Penn. St.), 455.
7. **Obstruction of surface water.]** A complaint stated that a city had raised the grade of an avenue, and neglected to provide means for carrying off the rain water which fell on the avenue or to prevent such water from draining on the adjoining lands, to the injury of the plaintiff's adjacent lot. *Held*, not to state a cause of action, as there was no allegation of the diversion of any stream upon the plaintiff's land, nor of the collecting and throwing surface water upon his land, nor of the causing of any more water to flow than would have flowed if the grade had not been raised. *Lynch v. Mayor* (N. Y.), 271.
8. **Police officers not servants of.]** The chief of police of a city is an officer of the State, and is not subject to removal by the mayor, and the mayor is liable in damages to him in a civil action for such removal. *Burch v. Hardwicke* (Gratt.), 640.

Liability of city for act of fire department.] See CONSTITUTIONAL LAW, 613.

Mechanics' lien on county bridge.] See MECHANICS' LIEN, 136.

MURDER.

Unborn child.] See CRIMINAL LAW, 69.

NATIONAL BANK.

1. **Ultra vires.]** Forfeiture of the privileges and powers of a National bank must be determined, by a suit brought by the comptroller of the currency, and until determined, it may do business ; and no person, by a conspiracy

NATIONAL BANK — *Continued*,

to evade its regulations, may escape liability for borrowed money loaned by it, upon personal security in the manner authorized. *Stephens v. Monongahela National Bank* (Penn. St.), 438.

2. **Usurious interest.**] In an action by a National bank against the maker of a note for accommodation, evidence was offered to prove a violation by the bank of section 5200 of the Revised Statutes of the United States, which declares "the total liabilities to any association of any persons or any company, corporation or firm, for money borrowed, including in the liabilities those of the several members thereof, shall at no time exceed one-tenth of the amount of the capital stock of such association actually paid in;" and that the loans in pursuance of it were in excess of the authority and power of the bank. The evidence being rejected, *held*, no error. *Id.*
3. **Renewal note.**] Where there has been a series of renewals for the same loan, in a suit by the bank upon the last note, the borrower is entitled to a credit for all the interest paid on the loan from the beginning and not merely the excess above the lawful rate. *Id.*
4. **Usury — loan to director — estoppel.**] Where a National bank makes to one of its directors a loan of money, which in amount and in the rate of interest is in contravention of the National Banking Act, the borrower is not estopped to defend against a recovery of interest. *Bank of Cadiz v. Stemmons* (Ohio St.), 364.
5. —.] If a payee take from the maker a promissory note, and at the same time surrender the maker's note of an earlier date given for a loan of money, the facts, and not merely what the payee called or considered the transaction, will determine whether it was a renewal or payment of the original loan. *Id.*
6. —.] In rendering judgment on a promissory note given to a National bank, in renewal, into which note illegal interest on the original note was incorporated, the whole interest of both notes will be disallowed. *Id.*
7. —.] Payments made generally on a promissory note to a National bank, which note embraces illegal interest, will be applied in satisfaction of the principal. *Id.*

NECESSARIES.

Liability of married woman for.] See MARRIAGE, 243.

NEGLIGENCE.

1. **Communication of fire — contributory negligence.**] In an action against a railway company, by the owner of real estate adjoining the track, for the burning of his house by sparks from a locomotive, it being found that the fire was communicated by reason of a defective spark arrester, *held*, that the plaintiff might recover, although the sparks entered the house through an open window in an unoccupied room, the plaintiff not being aware of the defect in the locomotive. *Louisville, New Albany & Chicago Railway Co. v. Richardson* (Ind.), 94.

NEGLIGENCE—*Continued.*

2. **Contributory—infant—presumptions.]** In the absence of clear proof to the contrary, an infant of the age of fourteen years will be presumed to have sufficient capacity to recognize and avoid danger. *Nagle v. Allegheny Valley Railroad Company* (Penn. St.), 413.
 3. — **locomotive engineer remaining at post.]** A locomotive engineer, killed by remaining upon his engine when a collision was imminent, and taking measures to stop his train, is not chargeable with contributory negligence as matter of law, although he might have escaped injury by leaving his post. *Cottrill v. Chicago, Milwaukee & St. Paul Railway Co.* (Wis.), 796.
 4. — **seaman obeying perilous order.]** A common seaman is bound to obey orders, and if he receives an injury in obeying an order manifestly perilous he is not chargeable with contributory negligence. *Thompson v. Hermann* (Wis.), 784.
 5. **Corporation, liability of, for that of general manager in selecting servants.]** A corporation which has delegated to one of its agents the power and duty of appointing and removing employees is liable to one of its employees for injury to him by the negligence of a third so appointed, when the agent has not exercised due care in the selection, although the agent himself is of competent skill and intelligence. *Tyson v. North and South Alabama Railroad Co.* (Ala.), 8.
 6. **Infant.]** A child six years and nine months old, running at large in the street, suddenly and unexpectedly attempted to mount the front platform of a street car, and was injured thereby. The driver, who was also conductor, was on the rear platform at the time, engaged in putting off another boy who was hanging on in a dangerous position. There was no fender on the front platform. *Held*, that *prima facie* there was no negligence to warrant a recovery. *Hestonville Passenger Railway Co. v. Connell* (Penn. St.), 473.
 7. **Innkeeper letting public hall.]** The plaintiff had been attending a ball at a public hall in the third story of an inn, and on coming away, instead of descending two flights of stairs, went out of a door left unlocked at the foot of the upper flight, and opening upon the roof of a piazza, and walking along the piazza roof stepped off the unguarded end of it, and fell to the ground. A verdict for the plaintiff against the innkeeper sustained, on the ground that by letting the hall he held it out to the public as safe, and was bound to render approach and egress safe. *Camp v. Wood* (N. Y.), 262.
 8. **Railroad company—contractor for construction.]** A railway company is not liable for damages resulting from negligence in the management of one of its trains, while being used and governed by contractors in the construction of a portion of its road under a contract with the company. *Cunningham v. International Railroad Co.* (Tex.), 633.
- Action for, against representatives of deceased.]** See ACTION, 186.
- **of servant against co-servant, for.]** See MASTER AND SERVANT, 114
- See CONTRACT, 703; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 455

NEGOTIABLE INSTRUMENTS.

1. **Accommodation maker.**] In respect to third persons, the accommodation maker of a note is liable to pay it according to its tenor, and cannot allege that he was merely a surety. *Stephens v. Monongahela National Bank* (Penn. St.), 438.
2. **Certificate of deposit payable in "currency."**] The word "currency," in a certificate of deposit, means money and bank notes, issued by lawful authority and in circulation at par with coin, and a certificate of deposit payable to order in "currency" is negotiable. *Klauber v. Biggerstaff* (Wis.), 778.
3. **Holder as collateral — right to maintain action on, after payment of his debt.**] One to whom a note has been indorsed as collateral security may maintain an action thereon against the maker, after the payment of his debt, either for himself or as trustee for the payee, unless the maker is thus deprived of some equitable defense as against the payee. *Logan v. Cassell* (Penn. St.), 453.
4. **Immaterial alteration — signing note in blank — addition of other makers and joint words.**] A note in blank, signed by one maker for accommodation, with a blank for words making it joint or several, is not rendered void in the hands of a *bona fide* purchaser as to the first maker by the joining of other makers without his knowledge or consent. *Snyder v. Van Doren* (Wis.), 739.
5. **Indorsement of note payable to A. or bearer.**] A note payable to A. or bearer was indorsed by A., with an assignment and guaranty to B. *Held*, that B. got title. *Johnson v. Mitchell* (Tex.), 602.
6. **Notice of protest — regularity of mailing — due diligence.**] A notary, having no precise knowledge of an indorser's residence, but being informed that she resided at A., mailed notice of protest to her at that place in care of the maker. She resided midway between A. and G., but had got her letters at G. There was no post-office at A, but it was the duty of the postal agents in such cases to deliver letters at the nearest post-office, which was G. *Held*, that the notice was regular, although it never reached the indorser, and although she had changed her residence before the mailing. *Central National Bank v. Adams* (S. C.), 495.
7. **Evidence.**] Parol evidence of declarations by a payee to maker, indorser or guarantor of a note, at the time of signing, that such signer shall not be called upon to pay the note, is incompetent. *Wright v. Remington* (N. J.), 180.
8. — **parol, to attach condition to bill of exchange.**] L., being indebted to the firm of J. M. S. & Co., gave to M., who acted for the firm, a draft for the amount on O., who was indebted to L. O. accepted the draft but it was not paid. In an action on behalf of J. M. S. & Co. against L. on the draft, *held*, that parol evidence was not admissible to show that M. agreed, at the time of the giving of the draft, that if it was accepted it should be a discharge of all liability of L. on the debt or on the draft. *Martin's Executrix v. Lewis' Executor* (Gratt.), 682.

NOTARY.

Disqualification of.] *See* CRIMINAL LAW, 293.

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NOTICE

Judicial.] *See* EVIDENCE, 575.

Of protest.] *See* NEGOTIABLE INSTRUMENT, 493.

NOTICE OF LOSS

See INSURANCE, 144.

NUISANCE

Livery-stable.] A livery-stable in a city is not necessarily a nuisance, and so where one has been burned down an injunction will not be granted against

NUISANCE — *Continued.*

rebuilding and using it, but only against its use in a manner proved to have been a nuisance. *Shiras v. Olinger* (Iowa), 188.

See CRIMINAL LAW, 555.

OFFICE AND OFFICER.

Notary.] *See CRIMINAL LAW, 293.*

Police officer not servant of municipal corporation.] *See MUNICIPAL CORPORATION, 640.*

OPINIONS.

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PARAPHERNALIA.

Larceny of.] *See CRIMINAL LAW, 508.*

PARTNERSHIP.

Share of the profits as compensation for services.] A partnership agreed with H. to manufacture 200 wagons for him, he advancing \$50 on each, the wagon to be sold, and H. to receive one-fourth of the profits and interest on the advances at five and a quarter per cent. *Held*, that this did not make H. a partner. *Richardson v. Hughitt* (N. Y.), 267.

See JUDGMENT, 673.

PARTY-WALL.

Right and manner of extension.] In the absence of any agreement regulating the height of a party-wall, either party may raise it, if it is of sufficient strength and can be raised without interference with or injury to the rights of the other party, but where the original agreement was for a dead wall, there can be no windows or other openings in the part so raised. *Dauenhauer v. Devine* (Tex.), 627.

PAYMENT.

Voluntary.] License fees, voluntarily paid the State, cannot be recovered. *Noyes v. State* (Wis.), 710.

PERJURY.

See CRIMINAL LAW, 293.

POLICE.

Officers — not servants of municipal corporation.] *See MUNICIPAL CORPORATION, 640.*

RAILWAY COMPANY.

Street.] *See TAXATION, 54.*

RAILROAD.

See NEGLIGENCE ; CARRIER.

RAPE.

See CRIMINAL LAW, 138, 544.

REAL PROPERTY.

Ice in pond, not.] A sale of ice, already formed in a pond, is a valid sale of personal property. *Higgins v. Kusterer* (Mich.), 100.

RECOMMENDATION.

False.] *See* GUARANTY, 562.

RECORDS.

Public, inspection of.] *See* MANDAMUS, 219.

REFEREE.

Judge cannot appoint himself.] *See* JUDGE, 172.

RESERVATION.

Of timber.] *See* DEED, 193, 511.

RIPARIAN OWNER.

See WATER-COURSE, 715.

SALE.

1. Article which may be unlawfully used.] In an action for the price of a billiard table it is no defense that it may be used for gambling, unless it was sold under a contract that it was so to be used ; and knowledge of such intended use will not be inferred from the fact that it was accompanied by a pool set and rules for its use. *Brunswick v. Valleau* (Iowa), 119.
2. Immoral.] It is no defense to a note given for a horse, that the horse was purchased for use in, and was actually used in, the Confederate service in the civil war. *Wallace v. Lark* (S. C.), 516.
3. — knowledge of vendor.] It seems that mere knowledge of the vendor that the purchaser intends to make an illegal or immoral use of the article purchased is not sufficient to defeat an action for the purchase-price. *Id.*
4. Warranty — what words amount to.] Defendant sold a fertilizing preparation, in bags with tags attached, stating the chemical ingredients. He also issued circulars, using the words, "highest standard," "under my own name and guarantee," "prepared under my inspection and control," "compounded of the purest materials ;" and referring by name to the chemist who made the analysis, adding, "whose name gives a warrant for its high character," etc. *Held*, an express warranty, not dependent upon the correctness of the chemical analysis. *Robson v. Miller* (S. C.), 518.

See AGENCY, 210 ; FRAUD, 716.

SCHOOL.

Right of teacher to chastise pupil.] A school teacher is not authorized to inflict excessive chastisement; nor to chastise except for a specific offense which the pupil understands; nor to chastise a pupil for refusing to study a branch from which his father had excused him. *State v. Misner* (Iowa), 128.

SETTLEMENT.

Ante-nuptial.] See MARRIAGE, 661.

SEWERS.

See MUNICIPAL CORPORATION, 455.

SLANDER.

Conspiracy to.] See CRIMINAL LAW, 198. *

SLEEPING CAR COMPANY.

See CONTRACT, 57.

SPECIFIC PERFORMANCE.

Of parol promise of voluntary conveyance.] A. offered his son-in-law B. who was living and in successful business in another town, that if he would remove to A.'s place of residence he would give B.'s wife a lot and an unfurnished house thereon. B. accordingly removed at expense, furnished the house with his own and his wife's earnings, and occupied it twelve years, but no conveyance was made as promised. C. then became insolvent, and then in consideration of five dollars and love and affection, conveyed the house and lot to a trustee for B.'s wife. *Held*, that the conveyance was not subject to the liens of prior judgments against C., but would be upheld. *Burkholder v. Ludlam* (Gratt.), 668.

STATUTE.

1. Construction — intercalary day in leap-year.] The statute of 21 Henry III, concerning leap-year, makes no provision as to how the 28th and 29th of February shall be counted in computing a number of days less than a year; the 29th of February is an independent day in such computations; and so service of a summons on the 25th of February, for a term commencing March 6th, is a valid ten days' notice. *Helphenstine v. Vincennes National Bank* (Ind.), 86.

2. Repeal of divorce laws — effect on pending action.] A statute repealing all divorce laws of the State ousts the court of jurisdiction in an action for divorce pending at the passage of the statute. *Grant v. Grant* (S. C.), 506.

3. "Office or professional employment"—real estate agent.] A real estate agent is not within a statute imposing a liability for "misconduct or neglect in 'office or in some professional employment.'" *Pennock v. Fuller* (Mich.), 148.

Construction of.] See CRIMINAL LAW, 598; MUNICIPAL CORPORATION, 837.

Evasion of.] See CRIMINAL LAW, 429.

See CONSTITUTIONAL LAW, 476.

STEVEDORE.

See MASTER AND SERVANT, 402.

STOCK.

Action to compel transfer.] *See* CORPORATION.

Transfer of.] *See* CORPORATION, 479.

SUPPORT

Of surface.] *See* MINES, 109.

SUNDAY.

Keeping open barber shop on.], *See* CRIMINAL LAW, 553

SURETY.

1. Bond delivered on condition.] A surety signed an appeal bond, and intrusted it to the principal on condition that it should also be signed by another whose name appeared in the body of the bond as a co-surety. The principal did not procure such additional signature, but erased that name and delivered the bond. *Held*, that the surety was not liable. *Allen v. Marney* (Ind.), 78.
2. — for faithful performance — change of principal's duties.] A bond was executed for the faithful performance of duty by an "assistant clerk" in a bank. He was employed as a messenger. Afterward he was promoted to the next higher clerkship, and still later to the position of book-keeper. In the last position he was stationed near the money-drawer, and from time to time abstracted money from it, and made false entries to conceal his crime. The last promotion was without the knowledge of his sureties on the bond. *Held*, that they were not liable for the embezzlement. *Manufacturers' National Bank of Newark v. Dickerson* (Vroom), 237.

STREET.

Change of grade.] *See* MUNICIPAL CORPORATION, 367.

Inclosure for private use.] *See* MUNICIPAL CORPORATION, 236.

TAXATION.

1. Corporation — capital stock and shares.] Stockholders in a moneyed corporation are liable to taxation on their shares, although the capital stock has also paid a tax. *City of Memphis v. Enoley* (Bart.), 532.
2. Exemption — bank building.] Under a statute exempting from taxation a lot of ground for the use of a private banking institution, the bank is not entitled to exemption of such parts of the banking-house as are leased to others. *De Soto Bank v. City of Memphis* (Bart.), 530.
3. Tax warrant — priority over execution.] A tax warrant delivered to the collector before an execution delivered to the sheriff, but not levied until after levy under the execution, has priority over it. *Pease v. Walsh* (Vroom), 201.

TAXATION — *Continued.*

4. **Street railway company liable for assessments.]** The rights, franchises and interests of a street railway company, chartered by the legislature and occupying a city street, by contract with the city, are liable to assessment for benefits in the widening of the street in which the track lies. *Chicago City Railway Company v. City of Chicago* (Ill.), 54.

TELEGRAPH COMPANY.

- Liability of, for message by impostor.]** An impostor, at Cincinnati, sent a dispatch in the name of B. over defendant's telegraph line, to C. at Selma, Alabama, requesting C. to send a telegraphic money order to B. at Cincinnati; C. complied, and defendant paid the money to the impostor at Cincinnati; *held*, that defendant was not liable for the mistake in the absence of any suspicious circumstances. *Western Union Telegraph Co. v. Meyer* (Ala.), 1.

TRESPASS.

1. **Injury to plaintiff's buildings by defendant's blasting on his own lands.]** Where the owner of a stone quarry, by blasting with gunpowder, destroys the buildings of an adjoining land-owner, it is no defense to show that ordinary care was exercised in the manner in which the quarry was worked. *City of Tiffin v. McCormack* (Ohio St.), 408.
2. **— contractor — master and servant.]** The owner of a stone quarry hired person "to go into the quarry, quarry stone therein, break the same to a certain size, and pile them up so they can be measured," and "had no other or further control" over the employee, who was "to furnish and find the gunpowder and other tools," and receive compensation at the rate of \$1 per perch; and the employee, by blasting with gunpowder, destroyed the buildings of an adjoining proprietor. *Held*, that the employer is liable for the injury inflicted by the employee. *Id.*

TRIAL.

See CRIMINAL LAW, 12, 445, 591.

ULTRA VIRES.

See MUNICIPAL CORPORATION, 657; NATIONAL BANK, 438.

USURY.

1. **a personal defense.]** Usury cannot be pleaded by a second mortgagee in an action to foreclose a prior mortgage on the same premises. *Ready v. Huebner* (Wis.), 749.

See NATIONAL BANK, 364, 438.

VOLUNTARY CONVEYANCE.

- Specific performance of parol promise of.]** *See* SPECIFIC PERFORMANCE, 608.
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WAGER.

Jurisdiction to set aside.] Chancery has jurisdiction to restrain the enforcement of an unexecuted and illegal wager contract, but it must be clearly alleged and proved that the stakes are not paid over. *Petillon v. Hippie* (Ill.), 31.

WARRANTY.

By agent to sell.] See AGENCY, 240.

What words amount to.] See SALE, 518.

See INSURANCE, 731.

WATER-COURSE.

Right of upper proprietors.] In an action by a lower against an upper riparian owner on a stream, for fouling the stream by means of a hog yard, and depriving him of its use for domestic purposes, an instruction, that if the stream in its natural state was more useful to all the owners for stock purposes than for ordinary domestic uses, the upper owner had a right reasonably so to use it, in spite of the injury complained of, is correct. *Maselline v. Case* (Wis.), 715.

WATER AND WATER-COURSE.

Obstruction of surface water.] See MUNICIPAL CORPORATION, 271.

WILL.

1. **Forged — title of purchaser under.]** A purchaser of lands in good faith from a devisee under a will admitted to probate gets good title, although the will is subsequently annulled as a forgery. *Steele v. Renn* (Tex.), 603.

2. **Attestation.]** A will need not be proven by two subscribing witnesses but may be admitted to probate upon extrinsic evidence, even where one of them denies the due execution. *Cheatham v. Hatcher* (Gratt.), 650.

3. **— request — proof.]** A request to a witness to subscribe a will may be made by a third person, provided the testator hears and understands it, and does not dissent. *Id.*

4. **— draftsman as beneficiary.]** A will may be valid, although the draftsman is a beneficiary under it, but it will be carefully scrutinized. *Id.*

See EVIDENCE, 15.

WITNESS.

Husband against wife.] See CRIMINAL LAW, 370.

Compelling prisoner to make tracks.] See CRIMINAL LAW, 308.

Privilege of physician.] See CRIMINAL LAW, 373.

— of prosecutrix for seduction.] See EVIDENCE, 523.

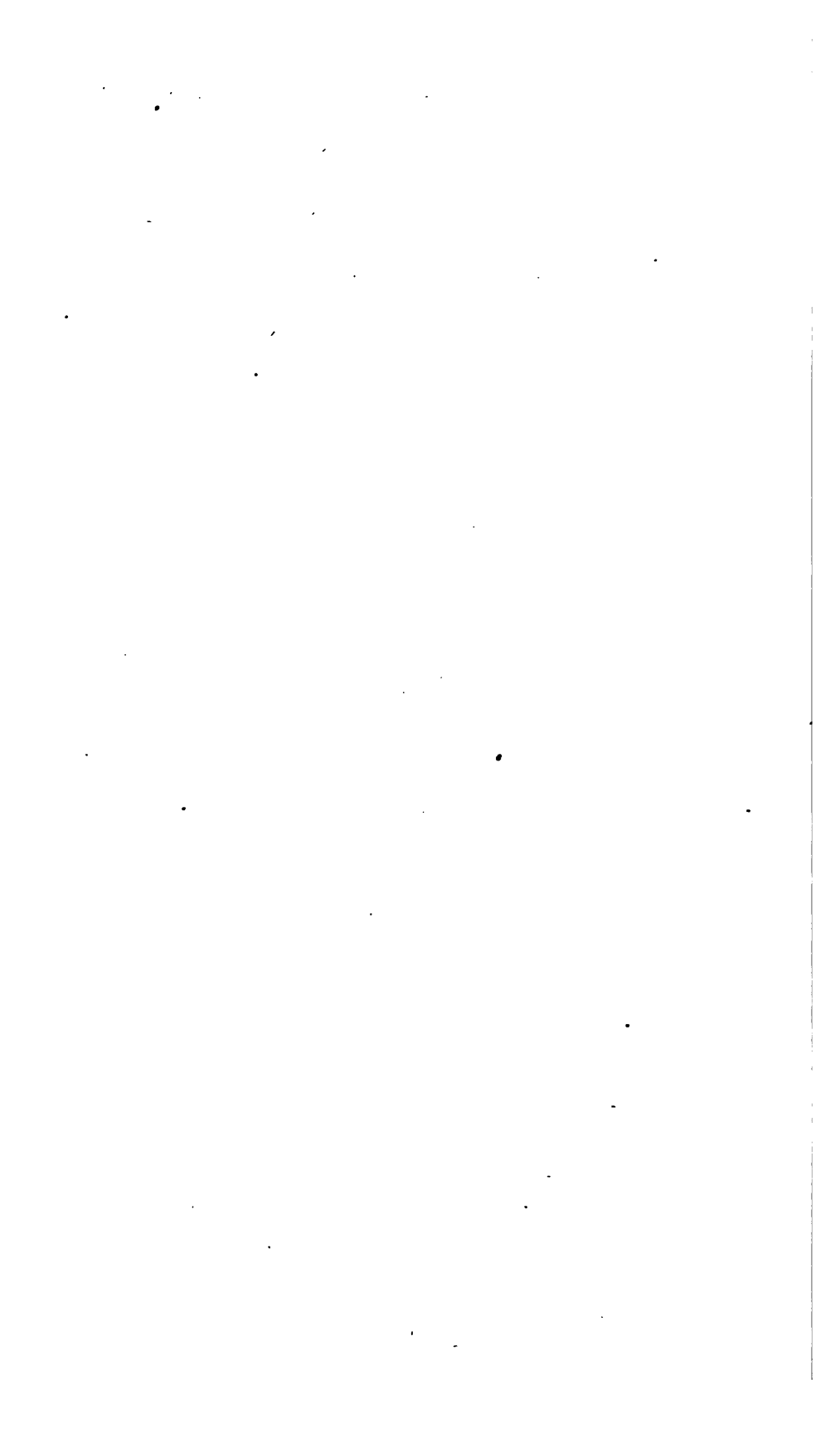
Subscribing.] See EVIDENCE, 568.

Prisoner.] See CRIMINAL LAW, 308.

WORDS.

- "Currency." *See* NEGOTIABLE INSTRUMENTS, 772.
- "Fugitive." *See* EXTRADITION, 116.
- "Head of a family." *See* EXEMPTION, 27.
- "Insanity." *See* INSURANCE, 335.
- "Line of street." *See* BOUNDARY, 719.
- "Labor." *See* MECHANICS' LIEN, 262.
- "Office or professional employment." *See* STATUTE, 122.
- "Proof evident." *See* CRIMINAL LAW, 577.
- "Religious purposes." *See* BURIAL GROUND, 417.
- "Toward." *See* CRIMINAL LAW, 533.









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